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No. 90-720

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1990

ALFREDO DeVARGAS,

Petitioner,

v.

MASON & HANGER-SILAS MASON CO., INC.; T.R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,
Plaintiff,

vs. CV No. 83-1674 HB

MASON & HANGER-SILAS MASON CO., INC.; T.R. HOOK; DON HARDWICK; THE UNITED STATES DEPARTMENT OF ENERGY; JOHN S. HERRINGTON; GARY GRANERE; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on defendants' supplemental motion for summary judgment on the issue of qualified good faith immunity, plaintiff's motion for relief pursuant to Rule 56(f), plaintiff's motion to compel production of documents for inspection and copying and defendants' renewed motion for a protective order. The court, having considered the motions, the memoranda and exhibits filed by the parties in conjunction therewith, the entire record, and consulted the applicable authorities, concludes that defendants' supplemental motion for summary judgment on the issue of qualified good faith immunity is well-taken and will be granted in part. Plaintiff's motion to compel production of documents for inspection and

copying is also well-taken and will be granted in part. Plaintiff's motion for relief pursuant to Rule 56(f) is not well-taken and will be denied, as will defendants' renewed motion for a protective order.

This a civil rights action arising out of the alleged refusal of defendants Mason & Hanger-Silas Mason Co., Inc., and its employees, T.R. Hook and Don Hardwick, to consider plaintiff's application for a position as a security inspector at the Los Alamos National Laboratory ("LANL") facilities in Los Alamos, New Mexico. Mason & Hanger employs individuals as security inspectors at LANL pursuant to a subcontract with LANL. LANL, in turn, is organized pursuant to a contract between the United States Department of Energy ("DOE") and the Regents of the University of California, and is engaged in weapons and atomic energy research.

I. Defendants' Supplemental Motion for Summary Judgment on Qualified Immunity

On April 9, 1986, this court issued a Memorandum Opinion and Order, in which defendants' motion for summary judgment as to many of the claims alleged in plaintiff's Complaint was granted in part and denied in part. This court denied defendants' motion for summary judgment on the basis of qualified, or "good faith" immunity as to Counts II, III and IV of plaintiff's Complaint. See DeVargas v. Mason & Hanger-Silas Mason Co, Inc., Civ. No. 83-1674, slip op. at 13, 15-16, 22-23, 26 (D. N.M. April 9, 1986). Defendants now present additional evidence in support of their "supplemental" motion for summary judgment on the issue of

qualified immunity and ask this court to reconsider its denial of such immunity in the April 9, 1986 Memorandum Opinion and Order.

The defense of qualified immunity, as articulated by the United States Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), provides that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Plaintiff argues that this court properly denied defendants' earlier motion for summary judgment on the basis of qualified immunity, because the law was clearly established that plaintiff could not be discriminated against on the basis of his handicap. Plaintiff has only one eye, and was denied employment as a security inspector at LANL pursuant to DOE regulation Interim Management Directive No. 6102 ("IMD 6102"), which provides that a "one-eyed individual shall be medically disqualified for security inspector duties." IMD 6102 § A 6 b (8). The question in this case is not, however, whether the law was clearly established that plaintiff could not be discriminated against on the basis of his handicap, but whether defendants reasonably should have known that their application of IMD 6102 would violate plaintiff's constitutional rights.

Defendants and plaintiff agree that Harlow mandates an inquiry into only objective factors; the defendants' subjective intent is not relevant to the question of the objective reasonableness of their conduct. In this case, IMD 6102 is one of many federal regulations required to be implemented in hiring

security personnel for LANL. Affidavit of Tommy R. Hook, § 2, Exhibit 1, Defendants' Supplemental Motion for Summary Judgment. Plaintiff does not dispute that at the time his application for employment was denied on the basis of IMD 6102, that regulation had not been declared unconstitutional by any court. Indeed, this court has since upheld the constitutionality of that regulation in its earlier Memorandum Opinion and Order in this matter. DeVargas v. Mason & Hanger-Silas Mason Co., Inc., supra, at 21-23. At the time plaintiff's application for employment was denied, therefore, it cannot be said that the law was clearly established that IMD 6102 was unconstitutional. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Harlow, supra.

Plaintiff argues, however, that defendants' failure to follow the medical review procedures specified in IMD 6102 § A 6 c makes suspect their reliance on the exclusion of one-eyed individuals in IMD 6102 § A 6 b (8). This argument lacks merit. First, the medical review procedures allow otherwise, medically unqualified applicants to be considered for medical qualification if a supplemental physical examination and other medical investigative procedures indicate that the applicant can safely and effectively perform all normal and emergency job duties. Unlike the provision excluding one-eyed individuals in IMD 6102 § A 6 b (8), the medical review provision is discretionary. Defendants were not, therefore, required to implement the medical review procedures. The Supreme Court has recognized that govern-

ment "officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.' " Davis v. Scherer, 468 U.S. 183, 196 (1984) (quoting P. Schuck, Suing Government 66 (1983)). Furthermore, in this case, defendants did not rely on their own interpretation of IMD 6102. After interviewing plaintiff in November, 1981, defendant Hook consulted with Robert E. Everhart, Mason & Hanger's Chief of Security, and defendant Hardwick, Mason & Hanger's Contract Manager. Affidavit of Tommy R. Hook, ¶5, Exhibit 1, Defendants' Supplemental Motion for Summary Judgment. They both interpreted the exclusion of one-eyed individuals as mandatory. Id. at ¶¶5,6. In March, 1983, when plaintiff again applied for a position as security inspector, the same three individuals again discussed IMD 6102, and drew the same conclusions about the mandatory nature of IMD 6102. Affidavit of Robert E. Everhart, ¶7, Exhibit 2, Defendants' Supplemental Motion for Summary Judgment. Even after consulting with Mr. Everhart and defendant Hardwick, defendant Hook verified their interpretation with defendant Pogna, LANL's Assistant Division Leader for the Security and Safeguards Division. Affidavit of Tommy R. Hook, supra, at ¶¶10, 11. Mr. Pogna verified his own opinion with defendant Walterscheid, Deputy Assistant Director-Legal Counsel at LANL, who was, in turn, of the opinion that the exclusion was mandatory and a valid regulation. Affidavit of Edward C. Walterscheid, ¶¶4-6, Exhibit 5, Defendants' Supplemental Motion for Summary Judgment. Therefore, in this case, as in Zook v. Brown, 575 F. Supp. 72 (C.D. Ill. 1983), defendants' actions were

reviewed by others, including at least one attorney. "If an attorney cannot determine that the law forbids certain government action, it cannot be found that individuals untrained in the nuances of constitutional law should have known that their conduct was identified as unlawful." Id. at 77.

Second, plaintiff errs when he suggests that defendants' subjective reliance on IMD 6102 § A 6 b (8) is a factor to be considered in determining whether they are entitled to claim the defense of qualified immunity, and that consideration of such subjective factors is appropriate in deciding a motion for summary judgment. The issue here is the reasonableness of the defendants' conduct, not whether they actually relied on the regulation. "Harlow v. Fitzgerald, supra, rejected the inquiry into state of mind in favor of a wholly objective standard." Davis v. Scherer, supra, at 191. Under the facts of this case, defendants are entitled to claim a defense of qualified immunity, because they should not reasonably have known that their application of IMD 6102 to deny plaintiff's application for employment as a security inspector would violate plaintiff's constitutional rights.

The defense of qualified immunity applies, however, only to actions against defendants in their individual capacities, Clulow v. State of Oklahoma, 700 F.2d 1291, 1299 n. 10 (10th Cir. 1983), and only to actions for money damages rather than prospective injunctive relief. Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). Furthermore, the defense of qualified immunity may only be asserted by government officials. Plaintiff argues that defendants Hook, Hardwick and Mason &

Hanger may not assert the defense of qualified immunity because they are private, rather than government, defendants. Plaintiff's argument is well-taken. The United States Supreme Court has rejected the concept of derivative immunity, Dennis v. Sparks, 449 U.S. 24, 29 (1980). Therefore, the private defendants may only assert the defense of qualified immunity if they are entitled to such a defense in their own right, rather than because they are alleged to have conspired with immune officials.

In Downs v. Sawtelle, 574 F.2d 1 (1st Cir.), cert. denied, 439 U.S. 910 (1978), a deaf mute sued under 42 U.S.C. § 1983, alleging a conspiracy between the plaintiff's sister and spendthrift guardian, a physician, and three social workers for sterilizing her against her will and removing her child from her custody. The court held that although the public officials might be protected by qualified immunity, the defense was not available to plaintiff's sister. The court reasoned that although qualified immunity for public officials was an integral part of the background of tort liability against which section 1983 was to be read, such immunity was not historically accorded to private individuals. Id. at 15. See also Howerton v. Gabica, 708 F.2d 380, 385 n. 10 (9th Cir. 1983). The Downs court also determined that the policies underlying qualified immunity for public officials did not support an extension of that immunity to private individuals:

> To place this court's imprimatur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties

> afforded by the statute. Private parties simply are not confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability facing police officers, governors and other public officials. Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights.

Downs v. Sawtelle, supra, at 15-16. This court agrees with the reasoning of the First Circuit Court of Appeals, and declines to extend the defense of qualified immunity to defendants Hook, Hardwick and Mason & Hanger in this case. Defendants' motion for summary judgment will, therefore, be granted as to the remaining DOE and LANL defendants insofar as the claims against them seek money damages, denied insofar as plaintiff seeks declaratory and injunctive relief, and denied as to defendants Hook, Hardwick and Mason & Hanger.

II. Plaintiff's Motion for Relief Pursuant to Rule 56 (f)

Plaintiff urges this court to order a continuance before ruling on defendants' Supplemental Motion for Summary Judgment on the issue of qualified immunity, pursuant to Fed. R. Civ. P. 56(f). Plaintiff argues that he should be entitled to conduct discovery to discredit the alleged subjective intentions of the defendants. This court has already ruled that the subjective intentions of the defendants are irrelevant to the availability of qualified immunity as a defense. See Part I, supra.

Plaintiff's motion for relief pursuant to Rule 56(f) is, therefore, without merit and will be denied.

III. Plaintiff's Motion to Compel Production of Documents and Defendants' Renewed Motion for a Protective Order

Plaintiff requests this court for an order compelling the defendants to produce the documents sought in his Supplemental Request for Production. Defendants, however, request this court to stay all discovery in this action pending "final resolution" of the issue of qualified immunity. At the end of October, 1984, plaintiff served a request for production of documents on defendants. Defendants filed a motion for protective order in November, 1984, based on the pendency of their motions for dismissal or summary judgment, and the doctrine of qualified immunity. On May 7, 1985, this court granted defendants' motion and entered an order staying all discovery in this action, because of the pendency of potentially dispositive issues of interpretation of law and good faith immunity. In April, 1986, plaintiff served a copy of his Request for Production of Documents on defendants on defendants. Plaintiff now argues that the dispositive issues have been ruled on by this court, and that none of the defendants have responded to his Request for Production of Documents. He urges this court to issue an order compelling all defendants to produce the documents he seeks. Defendants, however, have announced their intention to appeal the denial of qualified immunity, and request this court to stay all discovery until this question is finally resolved.

The United States Supreme Court has articulated the principle behind staying discovery pending resolution of the availability of the defense of qualified immunity: "Harlow emphasizes that even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" Mitchell v. Forsyth, 53 U.S.L.W. 4798, 4802 (U.S. June 19, 1985) (quoting Harlow v. Fitzgerald, supra, at 817). In this case, however, the principles justifying a stay of discovery do not apply. As discussed above, see Part I, supra, qualified immunity does not apply to claims for declaratory or prospective injunctive relief. Among the various claims for relief in this case, plaintiff seeks an injunction requiring Mason & Hanger to process his application for employment and to hire him if he passes the proper criteria for a security inspector. Defendants' defense of qualified immunity does not apply to this claim. There is, therefore, no reason to stay discovery pending resolution of the claim of qualified immunity. Defendants' motion for a protective order is, therefore, not well taken and will be denied. Plaintiff's motion to compel production of documents will not, however, be granted. Defendants shall either produce the documents requested or present proper objections to the discovery sought by plaintiff.

Now, Therefore,

IT IS BY THE COURT ORDERED THAT defendants' supplemental motion for summary judgment on the issue of qualified immunity is granted as to the remaining DOE and LANL defendants, insofar as

plaintiff seeks money damages and denied insofar as plaintiff seeks declaratory or injunctive relief. Defendants' supplemental motion for summary judgment is denied as to defendants Hook, Hardwick and Mason & Hanger. Plaintiff's motion for relief pursuant to Rule 56(f) is denied.

IT IS FURTHER ORDERED that plaintiff's motion to compel production of documents is well-taken and will be granted insofar as defendants must either produce the documents requested by plaintiff, or tender proper objections to the discovery sought. Defendants' renewed motion for a protective order will be denied.

s/s

Chief Judge

[Filed October 21, 1986]

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALFREDO DEVARGAS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 86-1894
	)	
MASON & HANGER-SILAS MASON CO., INC.; T.R. Hook, Individually and in his official capacity; DON HARDWICK, Individually and in his official capacity,	)	
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
JOHN DOES, Individually and in their official capacities, LOS ALAMOS NATIONAL LABORATORY; RICHARD ONE THROUGH TWO, Individually and in their official capacities;	)	

UNIVERSITY OF CALIFORNIA; ROBERT POGNA, Employee Los Alamos National Laboratory,

Defendants.

ALFREDO DEVARGAS,

Plaintiff-Appellee,

v. No. 86-2843

MASON & HANGER-SILAS MASON CO., INC.; T.R. HOOK, Individually and in his official capacity; DON HARDWICK, Individually and in his official capacity,

Defendants-Appellants,

and

THE UNITED STATES DEPARTMENT OF ENERGY; JOHN DOES, Individually and in their official capacities; LOS ALAMOS NATIONAL LABORATORY; RICHARD ONE THROUGH TWO, Individually and in their official capacities;

GARY GRANERE, Acting Area Manager-Department of Energy Los Alamos Area Office; UNIVERSITY OF CALIFORNIA; DONALD KERR, Director, Los Alamos National Laboratory; ED. C. WALTERSCHEID, Employee Los Aiamos National Laboratory; JOHN S. HERRINGTON; ROBERT POGNA, Employee Los Alamos National Laboratory,	)
Defendants.	)

Appeal from the United States District Court
for the District of New Mexico
(D.C. Civ. No. 83-1674 HB)

Joseph E. Earnest of Montgomery & Andrews, Santa Fe, New Mexico (Laurie A. Vogel of Cherpelis & Associates, Albuquerque, New Mexico, with him on the briefs) for Defendants-Appellants.

Steven G. Farber, Santa Fe, New Mexico (Richard Rosenstock, Chama, New Mexico, and Philip Davis, Albuquerque, New Mexico, with him on the briefs) for Plaintiff-Appellee.

Before LOGAN, MOORE, and TACHA, Circuit Judges.

LOGAN, Circuit Judge.

Alfredo DeVargas has vision in only one eye. In 1981 and again in 1983 he applied to be a security inspector with defendant Mason & Hanger-Silas Mason Co., Inc. (Mason & Hanger). Mason & Hanger, a private corporation, provides security inspectors for the Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico, pursuant to a subcontract with the Regents of the University of California (Regents). LANL operates under an agreement between the United States Department of Energy (DOE) and Regents. Mason & Hanger, through employee defendants T.R. Hook and Don Hardwick, refused to process DeVargas' application for employment, relying upon a then-applicable DOE regulation, Interim Management Directive No. 6102 Appendix IV (IMD 6102), which provided that "[a] one-eyed individual shall be medically disqualified for security inspector duties." Id. A 6 b (8), II R. Tab 65B-1 at 11.

In 1984, DeVargas brought suit under both 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971), against private defendants Mason & Hanger, Hook, and Hardwick; DeVargas asserted similar claims against public defendants LANL, DOE, Regents and several of their employees. DeVargas alleged that the refusal to hire him violated his civil rights; he sought damages, injunctive, and declaratory relief. The crux of his claims was that IMD 6102 was either unconstitutional or improperly interpreted by defendants.

The district court ruled that the individual government employee defendants were entitled to qualified immunity against DeVargas' claims for monetary damages, and it granted summary judgment in their favor.[1] The district court denied the qualified immunity defense of the private defendants, however, ruling as a matter of law that private parties were not entitled to this defense. The private defendants, relying upon Mitchell v. Forsyth, 472 U.S. 511 (1985), now seek interlocutory review of this denial of qualified immunity.

In considering this appeal, we must first address three jurisdictional issues: (1) whether these private parties claiming qualified immunity have a right to interlocutory appeal; and (2) whether DeVargas' joinder of a claim for injunctive and declaratory relief prevents this interlocutory appeal; and (3) whether the presence of allegedly disputed material facts relating to the qualified immunity claim prevents the appeal. Because we conclude that we have jurisdiction, we also address the merits, holding that private parties acting in accord with duties imposed by a contract with a governmental body are entitled to raise the defense of qualified immunity, and that the district court should have granted the private defendants qualifed immunity in this case.

---

[1] The district court earlier dismissed claims against Regents and LANL on the ground that they were entitled to immunity under the Eleventh Amendment. It also dismissed, on the ground of federal soverign immunity, the damages claims against DOE and those DOE officials sued in their official capacities. The claims against fictitious defendants were struck with the parties' consent. These district court rulings are not now before us on appeal.

I

Although the general rule is that a federal appellate court will not review district court orders before the entire litigation is concluded, see 28 U.S.C. § 1291, this "final judgment" rule has several exceptions. The key exception applicable in this case is the independent collateral order doctrine, pronounced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, (1949). The Supreme Court, in Mitchell v. Forsyth, 472 U.S. 511 (1985), held that the collateral order exception allows an interlocutory appeal of the denial of a defense of qualified immunity when a public official is sued for damages and the relevant facts underlying the qualified immunity defense are undisputed.

A

The Supreme Court has not addressed qualified immunity defenses raised by private parties; it has addressed only public officials' right to qualified immunity. See Mitchell, 472 U.S. at 511 (former U.S. Attorney General); Anderson v. Creighton, 55 U.S.L.W. 5092 (U.S. June 25, 1987) (FBI agent); Malley v. Briggs, 475 U.S. 335 (1986) (police officer); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (White House aides); see also Nixon v. Fitzgerald, 457 U.S. 731 (1982) (claim of absolute immunity by former President of the United States). The jurisdictional issue which we address now is not whether private parties may claim qualified immunity; the question is rather, assuming the validity of such a defense, whether a private party has the same right as a

government employee to bring an interlocutory appeal from the denial of such a defense. See Segni v. Commerce Office of Spain, 816 F.2d 344, 346 (7th Cir. 1987).

The case before us is not one in which a private party allegedly conspired with a public official to act outside the official's scope of authority. See Chicago & North Western Transport Co. v. Ulery, 787 F.2d 1239, 1241 & n.1 (8th Cir. 1986) (denying private party right of interlocutory appeal). But see Myers v. Morris, 810 F.2d 1437, 1441 (8th Cir.) (allowing private party to bring interlocutory appeal of denial of qualified immunity in concert with public officials appealing same issue), cert. denied, 108 S. Ct. 97 (1987). Rather, the private parties are a government contractor and its employees, and their defense to the claim of wrongful conduct is that they were performing the government contract according to its terms. Essentially, they argue, the government made them do it.

We hold that private parties acting pursuant to contractual duties may bring interlocutory appeals from the denial of qualified immunity. Cf. Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676, 684-85 & n.7 (5th Cir. 1985) (court had jurisdiction to hear appeal from order denying absolute immunity by registered national securities association which performed regulatory function). The Court's concern in Mitchell with encouraging efficient performance of public duties holds equally true in the situation before us. Forcing such private contractor parties to defend meritless damages actions at trial creates the same distractions from public duties as it

does for public employees. Just as qualified individuals may be deterred from public service if they are subjected to the cost and disruption of defending claims to which they are immune, so too might qualified private contractors be deterred from entering into contracts with government bodies. See Mitchell, 472 U.S. at 526 (quoting Harlow, 457 U.S. at 816).

B

DeVargas sought injunctive and declaratory relief, in addition to damages, from the private defendants. Mitchell expressly left open whether a defendant may immediately appeal the denial of the defense of qualified immunity to damages claims when a claim for injunctive relief remains pending in the trial court and will be tried regardless of the appeal's outcome. 472 U.S. at 519 n.5. This question has split the courts of appeal. Compare Bever v. Gilbertson, 724 F.2d 1083, 1086-87 (4th Cir.) (not appealable), cert. denied, 469 U.S. 948 (1984); Riley v. Wainwright, 810 F.2d 1006, 1007 (11th Cir. 1987) (per curiam) (presence of claim for injunctive relief alternative ground for denying appeal) with Scott v. Lacy, 811 F.2d 1153 (7th Cir. 1987) (per curiam) (appealable); Kennedy v. City of Cleveland, 797 F.2d 297, 306 (6th Cir. 1986) (same), cert. denied, 107 S. Ct. 1334 (1987); De Abadia v. Izquierdo Mora, 792 F. 2d 1187 (1st Cir. 1986) (same); Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984) (same). See also Note, Qualified Immunity and Interlocutory Appeal: Is the Protection Lost When Legal and Equitable Claims are Joined?, 87 Colum. L. Rev. 161 (1987) (supporting immediate appealability); cf. Musso v. Hourigan, 836 F.2d 736, 742 n.1 (2d Cir. 1988) (allowing appeal of

qualified immunity defense on one claim for damages although defendant faced potential damages liability on second claim still pending in trial court); Brown v. Texas A&M University, 804 F.2d 327, 332 (5th Cir. 1986) (same).

The basic premise of the minority view is that because resolution of the qualified immunity issue does not affect a claim for injunctive relief, and the defendant must stand trial anyway, the policies served by interlocutory appeal are not present. As the Fourth Circuit stated in Bever:

> "Whether or not [defendants] are immune from damages against them in their individual capacities, the litigation will demand their time and attention. A present declaration of immunity from damages claims cannot avoid the diversion of their attention from official duties which the litigation will occasion.
>
> . . . .
>
> In these circumstances, the question whether a denial of the immunity claims is appealable would appear to have little effect upon the willingness of responsible persons to serve in public office."

724 F.2d at 1087.

We believe the Bever court is mistaken. An action for injunctive relief no matter how it is phrased is against a defendant in official capacity only; plaintiff seeks to change the behavior of the governmental entity. Scott, 811 F.2d at 1153-54. Suits against public bodies or official-capacity governmental employees will be defended by government lawyers at no cost to the defendants and with no risk of personal monetary loss. In contrast, an action for damages is against the defendant individually, and if successful will result in personal liability. "[T]he fear of begin sued and held personally liable for damages is a far cry from a suit for reinstatement or injunctive relief, which public officials face regularly in the course of performing their duties." Bever, 724 F.2d at 1091 n.4 (Hall, J., dissenting). Further, individuals who are sued for damages may face the threat of punitive damages and likely will have to undergo the additional expense of retaining counsel. De Abadia, 792 F.2d at 1189-90; Kennedy, 797 F.2d at 306; Tubesing, 742 F.2d at 404 n.3. This personal liability will deter qualified individuals or business entities from performing work for the government in a way that threats of injunctive relief will not. See Harlow, 457 U.S. at 814, De Abadia, 792 F. 2d at 1190.

Moreover, if a request for injunctive or declaratory relief would prevent an appeal of denials of immunity, plaintiffs would be greatly tempted to join such claims in nearly every action. See Bever, 742 F.2d at 1091 (Hall, J., dissenting); Scott, 811 F.2d at 1154; De Abadia, 792 F.2d at 1190. We believe the policies behind permitting the appeal of a denial of a qualified immunity defense should not be so easily defeated. We therefore adopt the majority view and hold that a pending claim for injunctive relief does not bar our jurisdiction over an interlocutory appeal of a denial of a defense of qualified immunity to a damages claim.

C

DeVargas makes factual assertions which, he alleges, are material and should prevent defendants from appealing. In Mitchell, the Supreme Court allowed interlocutory appeal of a case presenting no factual disputes. The Court emphasized that "the appealable issue is purely a legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." 472 U.S. at 528 n.9.

Later Supreme Court cases have broadened appealability, holding that a court must look at a qualified immunity claim in the context of the particular facts of the case. In Anderson v. Creighton, 55 U.S.L.W. 5092 (U.S. June 25, 1987), the Court held that a plaintiff could not establish a "clearly established right" merely by pleading it in general terms, and that the court should examine the "information possessed" by the officials sued to see if a reasonable defendant could have believed his alleged acts to be lawful, in light of clearly established law. Id. at 5093. The court concluded:

> "The relevant question in this case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."

Id. at 5093. See also Malley v. Briggs, 475 U.S. 335, 345 (1986) (police officers applying for arrest warrants

are immune if a reasonable officer could have believed probable cause existed to support application).

We believe this command that lower courts apply a fact-specific review, when defendants raise before trial a qualified immunity defense, requires more than the court's judgment whether the facts as pleaded would justify a reasonable person taking the allegedly unlawful actions. In this respect we agree with the Eighth Circuit which holds that a court of appeals should consider in the light most favorable to the plaintiff all undisputed facts discernible from the pleadings and other materials submitted to supplement them by the time the motion for summary judgment is made.[2] Trapnell v. Ralston, 819 F.2d 182, 184 n.1 (8th Cir. 1987). See also Green v. Carlson, 826 F.2d 647, 650-52 (7th Cir. 1987). We disagree with the First Circuit, which considers only the facts alleged in the complaint, even if some discovery has been completed, see Bonitz v. Fair, 804 F.2d 164, 167-68 (1st Cir. 1986).[3]

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2 The court should consider all materials that are a part of the record at the time the motion for summary judgment is made. In some cases, only the pleadings are evaluated, see Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984) (plaintiffs required to meet heightened pleading standard in order to proceed to discovery), while in others, information developed by discovery is evaluated as well. See Green, 826 F.2d at 650.

3 In Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255 (1st Cir. 1987), the First Circuit elaborated upon this position. The court held that it could consider other undisputed facts in the record if the plaintiff had not alleged facts sufficient to determine whether defendants' actions violated clearly established law. Id. at 1259-60. See also Vasquez Rios v. Hernandez Colon, 819 F.2d 319, 321-23 (1st Cir. 1987) (looking to additional facts in record because plaintiffs' conclusory allegations were not sufficient for court to make reasoned finding on qualified immunity defense).

If defendants challenge the complaint by a motion for summary judgment supported by evidence controverting plaintiff's allegations, the court must consider, as it does with respect to any summary judgment motion, whether plaintiff's counteraffidavits or other evidence demonstrate a triable conflict on facts material to defendants' defense. See Kennedy, 797 F.2d at 299-300; see also Mitchell, 472 U.S. at 526 ("Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.") Indeed, in pro se prisoner cases we believe that the court may require what we call a Martinez report, see Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978) (en banc), to determine if a trial is justified. See generally Gee v. Estes, 829 F.2d 1005, 1007 (10th Cir. 1987) (per curiam).

The Supreme Court's approval of an interlocutory appeal in a fact-specific case like Anderson, in which the district court denied a pretrial qualified immunity defense motion, compels us to take an appeal, we believe, in all cases in which the denial is grounded upon a finding that disputed material facts exist in the case. Our task in such an appeal is not to determine liability on a battle of affidavits, but to determine whether, on the basis of the pretrial record, there exists a conflict sufficiently material to defendants' claim of immunity to require them to stand trial. See, e.g., Garrett v. Rader, 831 F.2d 202 (10th Cir. 1987) (ruling against defendant on qualified immunity appeal and remanding for trial).

Wright v. Southern Arkansas Regional Health Center, Inc., 800 F.2d 199 (8th Cir. 1986), illustrates the problem and the proper resolution. In Wright, plaintiff sued his health center employer, alleging that the employer violated his First Amendment rights by firing him in political retaliation. The constitutional right at issue was clearly established; what the parties disputed on interlocutory appeal, which the Eighth Circuit allowed, was whether sufficient evidence supported the claim that defendant's acts were improperly motivated. The court phrased the qualified immunity question as follows:

> "To put it in terms of the present case, the issue is not whether defendant was improperly motivated in fact, but, rather, when all the facts are viewed in the light most favorable to plaintiff, there is any genuine issue, triable to a jury, of improper motivation."

Id. at 203. See also Chinchello v. Fenton, 805 F.2d 126, 130-32 (3d Cir. 1986) (accepting interlocutory appeal of denial of qualified immunity despite presence of factual disputes).[4]

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[4] Several other circuits have accepted appeals from the denials of qualified immunity defenses despite the presence of factual disputes. See, e.g., Whitt v. Smith, 832 F.2d 451 (7th Cir. 1987); Dominque v. Telb, 831 F.2d 673 (6th Cir. 1987); Emory v. Holmes, 824 F.2d 143 (1st Cir. 1987). Implicit in the courts' review of the merits of the defenses is the decision that the courts had jurisdiction of the appeals despite the presence of factual disputes.

No doubt some interlocutory appeals of denials of qualified immunity defenses will be frivolous, as when affidavits or depositions in evidence, if believed, clearly support factual claims of violations of established law. That some interlocutory appeals may be frivolous, however, does not affect whether we have jurisdiction. These appellants or their counsel can be sanctioned for taking a frivolous appeal. Braley v. Campbell, 832 F.2d 1504, 1510-12 (10th Cir. 1987) (en banc).

II

A

Turning to the substantive issues, we note that DeVargas alleged both § 1983 and Bivens claims. For purposes of this opinion we treat the qualified immunity defenses to both claims as identical, assuming arguendo that a Bivens action would be available against a private party defendant.[5] We further assume that the scope of qualified immunity available to a private party defendant to a Bivens action is as broad as that available to a private defendant charged with the same acts in a

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[5] We need not decide whether or when a Bivens claim may be stated against private party defendants, as we rule that these private parties could claim qualified immunity in any event. See Bothke v. Fluor Engineers & Constructors, Inc., 834 F.2d 804, 809 (9th Cir. 1987). Resolution of this issue is by no means clear.

The district court below did not address whether a Bivens claim can be made against private party "federal actors." The circuits appear split on this point. Four circuits have held that a private party federal actor may be liable in a Bivens action: Reuber v. United States, 750 F.2d 1039, 1053-57 (D.C. Cir. 1984); Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982); Yiamouyiannis v. Chemical Abstracts Serv., 521 F.2d 227, 230 (6th Cir. 1975), cert. denied, 439 U.S. 983 (1978); but compare Wagner v. Metropolitan Nashville Airport Auth., 772 F.2d 227, 230 (6th Cir. 1985) (majority opinion rejects Bivens claim on grounds plaintiff did not allege defendant was federal employee); Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1337-38 (9th Cir. 1987). One circuit has refused to allow Bivens actions against private parties; Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 932 n.8 (1st Cir.), cert. denied, 419 U.S. 1001 (1974). Three circuits have expressly left open the question of whether a Bivens claim may ever be asserted against a private party: Stevens v. Morrison-Knudsen Saudi Arabia Consortium, 576 F. Supp. 516, 520-21 (D. Md. 1983), aff'd mem., 755 F.2d 375 (4th Cir. 1985); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 75-76 (8th Cir.), cert. denied, 429 U.S. 855 (1976); Morast v. Lance, 807 F.2d 926, 930-31 (11th Cir. 1987).

§ 1983 suit.[6] We thus analyze together the defense of qualified immunity to both claims, and we reach the same result as to both.

In its ruling below, the district court denied qualified immunity to defendants Mason & Hanger, Hook, and Hardwick solely because of their status as private parties.[7] The Supreme Court in Lugar v. Edmundson Oil Co., 457 U.S. 922 (1982), raised the

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6 The cases discussing qualified immunity of government officials apply essentially the same analysis whether a § 1983 or Bivens claim is made. See Butz v. Economou, 438 U.S. 478, 500 (1978) ("no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for identical violations under § 1983"); Harlow, 457 U.S. at 818 n.30 (same qualified immunity for state and federal officials).

7 At oral agrument we expressed some concern whether the defendants were federal or state actors for purposes of a § 1983 or Bivens claim. See Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Vincent v. Trend Western Technical Corp., 828 F.2d 563, 567-68 (9th Cir. 1987); Milonas v. Williams, 691 F.2d 931, 939-40 (10th Cir.1982). The defendants do not dispute in this appeal the district court's finding that they were state actors for purposes of the § 1983 claim and federal actors for the Bivens claim. We therefore do not discuss that issue.

possibility of recognizing such a defense but expressly reserved judgment on whether private parties may claim qualified immunity.[8]

In cases in which private party defendants allegedly conspired with public officials to deny plaintiffs their constitutional rights, lower courts have denied the private parties qualified immunity. See Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983);[9] Downs v. Sawtelle, 574 F.2d 1, 15 (1st Cir.), cert. denied, 439 U.S. 910 (1978).

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8 In Lugar, the Court held that a private party who jointly participated with state officials in seizing property pursuant to a procedurally defective state statute could be sued under § 1983 as acting "under color of state law." In responding to the dissent's concern about the effect of this ruling upon private individuals who innocently rely upon seemingly valid state laws, the court noted that the problem should be dealt with not by changing the elements of a § 1983 claim, but by establishing an affirmative defense. "A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture." Id. at 942 n. 23.

9 In Howerton, the Ninth Circuit appeared to state a broad rule that private party defendants could never claim good faith immunity. "[T]here is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights." Id. at 385 n.10. In a later case, however, the court appeared to retreat from this ruling. See Thorne v. City of El Segundo, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (raising but not deciding question of whether independent contractor state actor could claim qualified immunity defense).

(1985). We conclude that when private party defendants act in accordance with the duties imposed by a contract with a governmental body, perform a governmental function, and are sued solely on the basis of those acts performed pursuant to contract,[11] qualified immunity is proper.[12]

B

DeVargas argues that if we conclude that private parties may claim immunity, we should distinguish between the individual defendants (Hook, Hardwick) and the corporate defendant (Mason & Hanger), and grant § 1983 qualified immunity only to the individuals. DeVargas bases this argument on the following syllogism:

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11 We express no opinion on the propriety of granting qualified immunity when a private contractor performing a governmental function, such as operating a prison, performs acts not required by the contract, and is sued for those acts. See Kay, The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983, 40 Vand. L. Rev. 867, 883-88 (1987) (suggesting that when private contractors violate constitutional duties in order to maximize profit, qualified immunity is improper).

12 Myers v. Morris, 810 F.2d 1437 (8th Cir.), cert. denied, 108 S. Ct. 97 (1987), although primarily discussing absolute immunity for private defendants, is similar conceptually to the case before us. In Myers, the private party defendants were appointed by a state court to provide recommendations and reports concerning child abuse proceedings pending before that court. In granting absolute immunity for quasi-judicial functions, the court noted that the private defendants had the "authority, and perhaps the duty" to perform the acts of which plaintiffs complained. Id. at 1467 (emphasis added).

(1) municipal defendants in § 1983 actions are not vicariously liable for their employees' acts, but may be liable only upon a showing that their employees acted pursuant to official policy or custom, Monell v. Department of Social Services, 436 U.S. 658, 691 (1978); (2) corporate defendants similarly are not vicariously liable under § 1983, Lusby v. T.G.&Y. Stores, Inc., 749 F.2d 1423, 1432-33 (10th Cir. 1984), cert. denied, 474 U.S. 818 (1985) (cert. petition of private defendant T.G.&Y. Stores);[13] (3) municipal defendants in § 1983 claims received no qualified immunity defense, Owen v. City of Independence, 445 U.S. 622, 638 (1980); and therefore corporate defendants to § 1983 suits likewise should not be able to claim qualified immunity.

The basic premise underlying DeVargas' argument is that because the courts have extended the principle that municipalities are not vicariously liable under § 1983 to include corporate defendants, we should similarly extend the rule that municipalities are not entitled to qualified immunity to private corporations. We reject this premise. The issue of whether parties should be held vicariously liable is completely distinct from whether parties should be entitled to qualified immunity.

The Supreme Court's holding in Monell was based on congressional intent that § 1983 liability not be imposed vicariously. See Monell, 436 U.S. at 691-92. Although Monell addressed only the liability of municipalities, the rationale of its holding applies equally to

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13 Mason & Hanger does not dispute that its conduct satisfied the Lusby test for corporate § 1983 liability. See Appellants' Brief-in-Chief at 16-17 (firm had policy, pursuant to terms of contract, of not hiring one-eyed security inspectors).

But in cases in which private party defendants received the aid of public officials, pursuant to statutes that may be unconstitutional, to attach or garnish plaintiffs' property, the courts have concluded that private party state actor defendants should not be deprived of the qualified immunity defense. See Jones v. Preuit & Mauldin, 808 F.2d 1435, 1440-42 (11th Cir. 1987), vacated in part on other grounds, 822 F.2d 998 (11th Cir. 1987), opinion vacated and rehearing granted en banc, 833 F.2d 1436 (11th Cir. 1987); Watertown Equipment Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487 (8th Cir. 1987); Buller v. Buechler, 706 F.2d 844, 850-52 (8th Cir. 1983) (private individual who relies upon unconstitutional state garnishment procedure may assert qualified immunity defense); Folsom Investment Co. v. Moore, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982) (private party who relies on presumptively valid state attachment statute may claim qualified immunity); see also Carman v. City of Eden Prairie, 622 F. Supp. 963, 965-66 (D. Minn. 1985) (private defendant acting pursuant to state detoxification statute may claim qualified immunity defense); cf. Del's Big Saver Foods Inc. v. Carpenter Cook, Inc., 795 F.2d 1344, 1351 (7th Cir. 1986) (recognizing but declining to resolve issue); Thorne v. City of El Segundo, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (recognizing but declining to resolve issue in case involving independent contractor defendant).

In the instant case, the private party defendants are not alleged to have conspired with a government official to act beyond the boundaries of the law, or to have acted pursuant to an unconstitutional law which permits, but does not require, their conduct. Here, as the district court found, the private defendants reasonably

thought that their contract with a government body required them to act in a certain manner. The private parties' contract with LANL required Mason & Hanger to provide security forces for the laboratory, and to do so in accordance with DOE regulations, including IMI 6102.

The type of case before us presents the strongest arguments for extending qualified immunity to private party defendants. First, the governmental authority involved requires private defendants to act as they do. Indeed, were they to act otherwise they would likely be liable for breach of contract to the governmental body with whom they contracted. Not to allow immunity here places defendants between Scylla and Charybdis[10]—potentially liable either to plaintiffs for obeying the contract, or to governmental bodies for breaching it.

Second, the functions which the private parties performed pursuant to contract are functions which governmental employees would perform had the government not contracted them out. The Supreme Court instructs courts to examine the function of individual defendants—the nature of the individual responsibilities—not their status, in resolving immunity defenses. Forrester v. White, 56 U.S.L.W. 4067, 4070 (U.S. Jan. 12, 1988); Cleavinger v. Saxner, 474 U.S. 193, 201

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10 See Homer, The Odyssey, Book XII, 11.85-112; see also The Oxford Classical Dictionary, 228 (Charybdis), 968 (Scylla) (N. Hammond & H. Scullard 2d Ed. 1970).

corporate defendants. Lusby, 749 F.2d at 1433; Powell v. Shopco Laurel Co., 678 F.2d 504, 506 (4th Cir. 1982). In the area of §1983 immunities, the critical distinction is not between employer and individual defendants, but between defendants that are governmental bodies and other defendants. "[D]ifferent considerations come into play when governmental rather than personal liability is threatened." Owen, 445 U.S. at 653 n.37. When the Court has addressed immunity of government actors who may be personally liable, it has made it clear that immunity in some form is the norm. See Harlow, 457 U.S. at 818 & n.30. Similarly, we have just held generally that when private parties act pursuant to contractual duties and perform governmental functions, they can claim qualified immunity. That a private party defendant is a corporation should not change this result.

In establishing qualified immunity for public officials, the Court has emphasized policy reasons making that immunity necessary: (1) the injustice of making defendants personally liable merely for performing their duties, (2) the concern that the lack of qualified immunity would render public officials overcautious in their jobs, and (3) the difficulty of attracting qualified persons into public service were immunity not available. See Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); Harlow, 457 U.S. at 814. These reasons apply equally to all private defendants acting pursuant to contract, whether individuals or corporations. A nonimmune contractor defendant would be required to bear the total cost of plaintiff's injury, regardless of the objective

reasonableness of its acts.[14] In addition, denying immunity would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service.

In contrast, a governmental body found liable can pay the judgment from the public treasury, shifting the cost to society at large; thus denying immunity does not cause the same injustice. See Owen, 445 U.S. at 654-55 & n.39. And the liability of the municipality itself will have little chilling effect on the acts of its officers when those officers are not personally liable. Id. at 655-56.

We therefore conclude that the corporate status of Mason & Hanger should not affect its immunity. See Folsom, 681 F.2d at 1037-38 (allowing immunity to private insurance corporations); Watertown Equipment Co., 830 F.2d at 1490 (corporate defendant entitled to claim qualified immunity defense); see also Jones, 808 F.2d at 1440-42 (private partnership may invoke qualified immunity defense).

III

The district court denied qualified immunity to defendants Hook, Hardwick and Mason & Hanger solely on the basis of their private status, and granted

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[14] DeVargas argues that this cost rationale should have little effect here, as Mason & Hanger's defense and litigation costs may ultimately be paid by DOE as expenses. Even if Mason & Hanger will ultimately bear no costs here, however, the fact remains that DOE will only reimburse Mason & Hanger and therefore that Mason & Hanger must pay some costs up front. Bearing this cost imposes a burden on Mason & Hanger, and may discourage it and other private corporations from entering government contracts in the future.

qualified immunity for all public employee defendants. Since we conclude that these private defendants may claim qualified immunity, we must next ask whether they are entitled to immunity on the facts before us.

In reviewing appeals of denials of qualified immunity, our primary concern is not whether defendants violated plaintiffs' rights, but whether defendants "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. If the law was not clearly established at the time defendants acted, they are entitled to qualified immunity. Id.; Mitchell, 472 U.S. at 524. The test of what law is clearly established "should be determined in a particularized sense." Garrett v. Rader, 831 F.2d 202, 204 (10th Cir. 1987); Anderson, 55 U.S.L.W. at 5093. This test requires "some but not precise factual correspondence" between precedent establishing law and the case on review, and demands that defendants apply "general, well developed legal principles." Garcia v. Miera, 817 F.2d 650, 657 (10th Cir. 1987) quoting People of Three Mile Island v. Nuclear Regulatory Commission, 747 F.2d 139, 144 (3d Cir. 1984).

DeVargas presents not material fact questions,[15] but two basic theories of liability for handicap discrimination, one based upon a reading of IMD 6102, and the other on a constitutional violation if defendants' interpretation of IMD 6102 is correct.[16] Under the foregoing test, neither of plaintiff's theories establishes a violation of a "clearly established right" of which a reasonable defendant would be aware.

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15 DeVargas asserts the existence of two questions of material fact that would preclude a grant of immunity. The first question which DeVargas styles as "factual" concerns the proper meaning and interpretation of IMD 6102. Since IMD 6102 is a federal regulation, its interpretation is a question of law, not of fact. Hoover & Bracken Energies, Inc. v. United States Department of Interior, 723 F.2d 1488, 1489 (10th Cir. 1983), cert. denied, 469 U.S. 821 (1984). The second question is whether defendants' reliance on their interpretation of IMD 6102 to deny DeVargas employment was reasonable. See infra note 22. Although the reasonableness of this reliance presents a factual dispute, this dispute is not material in light of our conclusion, infra, slip op. at 24-25, that any right which DeVargas claims was not clearly established at the time defendants acted.

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16 DeVargas does not assert on appeal, and we do not address, his earlier claim that defendants' conduct violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The district court granted summary judgment against DeVargas on his § 504 claims, finding Mason & Hanger not a recipient of "federal financial assistance," a necessary element of such claims.

A

DeVargas' first theory asserts that IMD 6102, as a federal regulation, gave him the right to a physician's review of his disqualification for having sight in only one eye. DeVargas argues that because IMD 6102 A 3 e[17] requires a "designated physician" to determine whether an examinee meets the medical qualification standards, defendants erred in not having a physician determine his disqualification under IMD 6102 A 6 b (8) for being one-eyed. DeVargas claims defendants compounded this initial error because no designated physician reviewed DeVargas' initial disqualification under IMD 6102 A 6 c.[18] He asserts that these errors constitute a § 1983 violation.

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17 IMD 6102 A 3 e provides: "The ascertainment as to whether or not the examinee meets the medical standards of this part shall be made by a designated physician." II R. tab 65B-1 at 3.

18 IMD 6102 A 6 c provides: "Despite an initial indication of medical disqualification, examinees may be considered for medical qualification when, in the judgment of the designated physician, a thorough history, supplemental physical examination and other appropriate laboratory test [sic] and medical investigative procedures indicate that the examinee can safely and effectively perform all normal and emergency job duties; and provided that the designated physician determines that all such duties are within the physical capability and exercise tolerance of the examinee. The designated physician shall notify the cognizant field office management authority of, and document the basis for, such determinations at the time they were made."

II R. tab 65B-1 at 12-13.

We do not decide whether DeVargas' rights under IMD 6102 were violated or indeed whether IMD 6102 can provide the basis for a § 1983 claim,[19] for any rights DeVargas had under IMD 6102 to physician review were not clearly established. First, DeVargas has not identified any authoritative interpretation of IMD 6102 extant when he applied for employment. In addition, while IMD 6102 A 3 e appears to require a physician to make all medical qualification decisions, such a requirement makes sense only with regard to those medical disqualifications under IMD 6102 A 6 b which require the physician's judgment to determine their presence,[20]

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19 In at least some instances, violations of rights provided under federal regulations provide a basis for § 1983 suits. Wright v. City of Roanoke Redevelopment & Housing Auth., 55 U.S.L.W. 4119, 4122 (U.S. Jan. 14, 1987); Samuels v. District of Columbia, 770 F.2d 184, 199-201 (D.C. Cir. 1985). We need not now decide whether violation of the regulation here in question allows for suit under § 1983, as we hold defendants can claim qualified immunity from damages. See Gholston v. Housing Auth. of City of Montgomery, 818 F.2d 776, 780-81 (11th Cir. 1987) (avoiding question of whether regulation under review could form basis for § 1983 suit).

20 See, e.g., IMD 6102 A 6 b (1) (respiratory disabilities); IMD 6102 A 6 b (2) (b) (cardiovascular disabilities); IMD 6102 A 6 b (3) (a) (endocrine, nutritional or metabolic disabilities); IMD 6102 A 6 b (5) (hematopoietic disorders); IMD 6102 A 6 b (6) (malignant neoplasms).

or require a review of medical history or diagnosis.[21] In contrast, IMD 6102 A 6 b (8) does not refer to medical judgment, review of history, or diagnosis, but states a mandatory disqualification. Thus, whether a physician must confirm what DeVargas already knew and fully disclosed—his monocular condition—when the presence of that condition is a mandatory disqualification for security inspector, was not "clearly established" at the time defendants acted.[22]

Finally, DeVargas has no right to physician review under IMD 6102 A 6 c, as that section allows physician review, but does not require it.

B

DeVargas' second argument is that if defendants' reading of IMD 6102—that it prohibits hiring one-eyed security inspectors—is correct, the regulation violates clearly established equal protection rights of the handicapped. This argument also lacks merit. Since the handicapped are not a suspect class for equal protection analysis, Brown v. Sibley, 650 F.2d 760, 765-66 (5th Cir. Unit A 1981), and DeVargas has no fundamental

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21 See, e.g., IMD 6102 A 6 b (7) (neurological disorders); IMD 6102 A 6 b (9) (mental or emotional disorders).

22 Also relevant, as the district court noted, was the fact that defendants did not rely on their own interpretation of IMD 6102 A 6 b (8) as a mandatory disqualification, but sought the opinion of other individuals at Mason & Hanger and LANL, including an attorney for LANL. All of these individuals likewise saw A 6 b (8) as mandatory and disqualifying.

constitutional right to government employment, Coleman v. Darden, 595 F.2d 533, 538 (10th Cir.), cert. denied, 444 U.S. 927 (1979), IMD 6102 violates equal protection only if it is not rationally related to the goals of DOE, which promulgated it. Plaintiff points to no decision that IMD 6102 or a similar rule lacks rational basis. Indeed, DOE's and Congress' concern with protecting the classified and nuclear material at LANL, see Transcript of Proceedings Before the Subcommittee on Procurement & Military Nuclear Systems of the Committee on Armed Services of the United States House of Representatives, III R. tab 65C at 17-18, 23-25 (dialogue between Congressman Daniel and Thomas R. Clark, Deputy Manager, Albuquerque Operations Office, DOE), together with the logical inference that a fully sighted person may perform those security functions more capably than an individual only partially sighted, go far to show such rational basis. At any rate, neither IMD 6102's disqualification of one-eyed persons nor defendants' enforcement of IMD 6102 violates clearly established equal protection rights. Defendants therefore are entitled to qualified immunity.[23]

In summary, we accept jurisdiction of this appeal, REVERSE the district court's denial of qualified immunity for private defendants Hook, Harwick, and Mason & Hanger, and REMAND for trial on such equitable claims as remain before the district court.

[Filed April 7, 1988]

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[23]DeVargas also argues in his brief that section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, and regulations enacted pursuant thereto, establish a duty, or at least a strong congressional policy, for government contractors to hire the handicapped. To the extent DeVargas argues violation of a § 503 duty, we reject the theory because it was not raised in his complaint before the district court. To the extent he argues that § 503 shows congressional policy to hire the handicapped, such a policy statement cannot constitute a "clearly established rule of law," the violation of which would foreclose immunity.

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

(a) Promulgation of rules and regulations

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity)

to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers; exception

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

UNITED STATES DEPARTMENT OF ENERGY
INTERIM MANAGEMENT DIRECTIVE NO. 6102
JANUARY 31, 1978

APPENDIX PART IV

PROTECTIVE PERSONNEL

A. Medical Qualification Standards

1. Applicability. This part provides the minimum medical qualifications, criteria, and guides to be used by designated physicians in advising responsible DOE officials whether the medical and physical condition of protective personnel (except DOE couriers) employed by, or prospective protective personnel to be employed by, DOE or DOE contractors reasonably assures that they can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site, and the general public.

2. General Definitions

a. Medical Condition and Medical Requirements

As used in these standards, the term "medical condition" includes general health, physical condition, emotional and mental stability, and mental health. The term "medical requirements" embraces all of these areas.

b. Shall, Should, and May

The word "shall" is used to denote a requirement, the word "should" to denote a recommendation, and the word "may" to denote permission. In order to conform to these standards, protective personnel staff selection and maintenance shall be performed in accordance with the requirements, but not necessarily with the recommendations or guides.

c. Designated Physician

An occupational medical physician who is designated and recommended by the local DOE field office and authorized by the Medical Director, Office of Operational and Enviromental Safety, Headquarters, to determine the medical and physical condition of protective personnel. When an occupational medical physician is not available, physicians who are not board-qualified in occupational medicine may be recommended and authorized as designated physicians for the purpose of this part. Designated physicians need not be employed full-time, but shall be contractually responsible to DOE for performance of the medical functions required by this part.

d. Contractor

As used in this part, the term "contractor" includes subcontractors.

e. Security Inspector

A uniformed individual who is authorized under Section 161.k. of the Atomic Energy Act of 1954, as amended, or other appropriate statutory authority to carry firearms and who is employed for, and charged with, the protection of classisfied matter, special nuclear material, or other Government property.

f. Guard

An individual, not necessarily uniformed, who is employed for, and charged with, the protection of

classified matter or Government property. Guards shall be armed with nonlethal weapons such as a billy-club, "Stun-Gun", or aerosol irritants.

g. Waiver of Medical or Physical Fitness Requirements

A determination by the cognizant field office management authority, with the advice and concurrence of a designated physician, that a security inspector or guard may be retained in an active status for the effective performance of normal and emergency duties within the limitations recommended by the designated physician and approved by the cognizant field office management authority.

3. Application of Medical Qualification Standards

a. The standards of this part are the minimum necessary to determine the medical and physical capability of protective personnel to perform all normal and emergency duties effectively and safely. Protective personnel must be mentally alert and capable of exercising good judgment, implementing instructions, and assimilating necessary specialized training. Protective personnel shall be capable of reading post orders and comprehending orders written or spoken in English. Emotional and mental stability is essential for the effective performance of security inspector and guard duties. Security inspector duties routinely require contact with the public and the carrying of firearms and, under emergency situations, may

involve long working periods without relief, absence of detectable neurotic or psychotic conditions which would adversely affect a security inspector's ability to handle firearms safely or to act safely and effectively in emergency conditions is a necessity.

b. Security inspector applicants shall meet the standards of this part prior to assignment to security inspector duties.

c. Incumbent security inspectors shall meet the standards of this part annually or shall be relieved of security inspector duties, subject to the provisions of paragraph A.8., below.

d. Employees assigned to guard duties shall meet the standards of this part prior to assignment to guard duties and biennially thereafter, subject to the provisions of paragraph A.11., below.

e. The ascertainment as to whether or not the examinee meets the medical standards of this part shall be made by a designated physician.

f. The ascertainment as to whether or not the examinee meets the physical fitness standards of this part shall be made by a designated management supervisory official subject to the prior advice of a designated physician.

g. These medical standards allow the designated physician to exercise considerable freedom of clinical judgment in ascertaining the medical qualification of protective personnel who may have

certain kinds of medical or physical deficiencies. The designated physician may medically certify such individuals for duties without limitation after a determination is made of the individual's ability to safely and effectively perform all normal and emergency duties. This determination may require special medical evaluations or practical performance tests to demonstrate the examinee's performance abilities. When such determinations are contingent upon performance tests, the judgment of adequacy of performance shall be made by designated line supervisory authorities, or the designated physican, as appropriate.

h. For those facilities where it is necessary to determine the medical qualification of security inspectors or security inspector applicants to perform special assignment security inspector duties which might require exposure to unusually high levels of stress or physical exertion, field office managers may develop more stringent medical qualification requirements or additional medical or physical tests as necessary for such determinations. All such additional qualification requirements shall be forwarded, with justification, for the concurrence of the Director, Safeguards and Security, Headquarters, prior to application.

i. The provisions of former ERDA appendix 0528-A, part I should be applied for return to work after recovery from a temporarily disqualifying medical or surgical condition.

4. Administrative Procedures and Requirements

a. Medical Confidentiality and Retention of Medical Reports

(1) The medical information and data on each employee or applicant shall be maintained as confidential, privileged medical information and shall not be released by the designated physician without the written consent and release of the employee or applicant, except as permitted or required by law.

(2) When an individual has been examined by a designated physician, all available history and test results should be retained by the responsible DOE or DOE contractor medical department, in accordance with former ERDA appendix 0230, whether or not the candidate completes the examination, and whether or not potentially disqualifying defects are recorded.

(3) The design of forms used for medical evaluation by a local facility shall remain the responsibility and prerogative of the facility.

b. Change of Health Status of Protective Personnel

(1) It is the specific responsibility of a protective personnel employee to report immediately to his/her supervisor any known or suspected change in his/her health which might impair his/her capacity for duty or the safe and effective conduct of assigned job tasks.

(2) Supervisory personnel have the responsibility to make a timely report to the designated physician on any behavorial or health changes or deterioration in work performance that is observed in protective personnel under their jurisdiction. Examples of areas that may indicate medical or emotional problems include: incidents of ineptness, poor judgment, lack of physical or emotional stamina, social incompatibility, absence, lateness, and a tendency to become accident prone.

(3) Potential psychological or medical conditions that could impair judgment or ability to perform assigned duties safely and effectively are more amenable to early detection, diagnosis, and treatment when referred early to the designated physican for evaluation.

c. Use of Prosthetic Devices

(1) When the use of prosthetic devices, such as eyeglasses and hearing aids, is required to enable an examinee to successfully meet medical qualification requirements, a determination shall be made by a designated line supervisory authority that the use of all such devices is compatible with all emergency and protective equipment that the examinee may be required to wear or use.

(2) It is incumbent upon cognizant field office management authority to exert all reasonable and practicable effort to accommodate required emergency and protective equipment to the use of prosthetic devices, including the provision of equally effective alternate equipment if such is available.

(3) If eyeglasses are used, they shall be of the safety glass type.

5. Security Inspector Medical Qualification

a. General Qualifications

The examinee shall possess mental, sensorial, and motor skills consistent with his/her assigned duties, viz:

(1) Mental alertness and reliable judgment.

(2) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals as required by assigned job duties.

(3) Motor power, range of motion, neuromuscular coordination and dexterity as required to safely and effectively perform all assigned job duties.

b. Specific Minimum Qualifications

(1) Head, Face, Neck, Scalp

Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is a job requirement in normal or emergency operations.

(2) Nose

Ability to detect odor of products of combustion and of tracer or marker gases.

(3) Mouth and Throat

Capacity for clear speech as required for effective communication on the job.

(4) Ears

Hearing loss in the better ear not to exceed 30 db average at 500, 1000, and 2000 Hz with no level greater than 40 db in any of these frequencies (by ISO 1964 or ANSI 1969 audiometry). If a hearing aid is necessary, suitable testing procedures shall be used to assure auditory acuity equivalent to the above requirement.

(5) Eyes

(a) Distant Visual Acuity

1. Uncorrected acuity of no less than 20/200 in the better eye.

2. Corrected acuity of at least 20/30 in the better eye and 20/40 in the other eye.

3. If uncorrected distant vision in the better eye is not at least 20/40, the security inspector shall carry an extra pair of corrective lenses.

(b) Near Visual Acuity

Corrected or uncorrected vision of at least 20/40 (14/28 Snellen) in the better eye.

(c) Color Vision

Ability to distinguish red, green, and yellow. Special color vision testing and certification shall be required where fine color discrimination is critical to the safe or effective performance of assigned job tasks. On-the-job evaluation is recommended where a mild color vision defect is identified.

(d) Peripheral Vision

Field of vision in the horizontal meridian shall not be less than a total of 140^{o}.

(e) Depth Perception

Adequate depth perception as measured by stereopsis or demonstration in a practical operational test.

(6) Cardiorespiratory

(a) Respiratory

Capacity and reserve to perform physical exertion in emergencies at least equal to the demands of the job assignment, and ability to utilize respiratory protective filters and air supply masks when these are job requirements.

(b) Cardiovascular

Normal configuration and function. Capacity for exertion during emergencies. Normal resting pulse;

regular pulse. Full symmetrical pulses in extremities and neck. Normotensive, with tolerance to rapid postural changes. If, in the judgment of the designated physician, the examination reveals significant cardiac arrhythmia, murmur, enlargement, hypertension, hypotention, or other evidence of cardiovascular abnormality, a report of an evaluation by a specialist in internal medicine or cardiology may be obtained and evaluated by the designated physician.

(7) Abdomen and Viscera

No clinically significant abnormalities.

(8) Musculo-Skeletal

Normal symmetrical structure, range of motion, and power. If any impairment exists, the examinee shall demonstrate ability to complete effectively and safely all assigned duties and job tasks to the satisfaction of the supervisor.

(9) Skin

No significant abnormal intolerance to chemical, mechanical, and other physical agents. Capability to tolerate use of personal protective covering and decontamination procedures when these are required by the assigned job duties.

(10) Endocrine/Nutritional/Metabolic

Endocrine/nutritional/metabloic status adequate to

meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing work schedules or to delay meals without potential incapacity.

(11) Hematopoietic

Normal function.

(12) Lymphatic

Normal.

(13) Neurological

Normal central and peripheral nervous system function.

(14) Mental and Emotional

Normal mental status. Ability to perform normal and emergency job assignments.

(15) Laboratory

(a) Hemogram

Freedom from clinically significant abnormalities of the formed elements of the blood that, in the judgment of the designated physician, could reasonably be expected to affect the safe and effective performance of assigned duties.

(b) Urinalysis

Absence of proteinuria and glycosuria unless the absence of a disqualifying systemic or genitourinary condition and the absence of significant microscopic abnormality has been demonstrated.

(c) Other Studies

Any other medical investigative procedure, including electrocardiogram and chest x-ray, which the designated physician considers necessary for adequate medical evaluation shall be conducted.

6. Security Inspector Medical Disqualification

a. Freedom from Incapacity

The examinee shall be free of the following conditions that are determined by the designated physician to be medically disqualifying for the safe and effective performance of assigned duties:

(1) Mental, emotional, or physical impairment.

(2) Medical, surgical, or other professional health treatment.

(3) Any other treatment, drugs, chemicals, diets, or agents.

(4) Any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

b. Conditions for Which Medical Disqualification Shall Normally be Mandatory

A history of any disqualifying condition shall normally be considered disqualifying unless adequate supplemental investigations and findings demonstrate that no disqualifying condition exists. Such demonstration shall include at least the specific narrative entries by the designated physician and relevant aspects of medical history, physical examination, and laboratory findings. The need for additional investigative procedures or specialty evaluation shall be determined by the designated physician. The presence of any of the following conditions normally shall disqualify the examinee:

(1) Respiratory

Significant pulmonary pathology or decrease in pulmonary function which, in the judgment of the designated physician, could interfere with the safe and effective performance of assigned duties.

(2) Cardiovascular

(a) The following conditions shall be medically disqualifying for security inspector duties:

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrythmia

7. Arterial Aneurysm

8. Significant Peripheral Vascular Insufficiency

9. Corrective Heart Surgery

10. Corrective Arterial or Great Vessel Surgery

11. Prosthetic Valve

12. Artificial Pacemaker

(b) In selected cardiovascular cases, in the judgment of the designated physician, examinees may be considered for medical qualification for security inspector duties if thorough history, physical examination, electrocardiogram, and other test procedures indicate satisfactory cardiac function and reserve sufficient to allow the examinee to safely and effectively perform all assigned job duties, both normal and emergency, provided that the designated

physician determines that all such duties and job tasks are within the physical capability and exercise tolerance of the examinee.

(3) Endocrine/Nutritional/Metabolic

(a) Any endocrine, nutritional, or metabolic condition that, in the judgment of the designated physician, would not allow the examinee to adequately meet the stresses and demands of assigned normal or emergency job duties.

(b) Inability to accommodate to changing work schedules or to delay meals without incapacity or potential incapacity.

(c) Inability to tolerate prolonged use of wearing of protective garments such as respirator masks, air masks, or bullet-resistant garments.

(d) Diabetes mellitus requiring the use of insulin. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.

(e) Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency duties.

(4) Skin

Recurrent severe dermatitis or hypersensitivity to irritants or sensitizers sufficient to interfere with wearing required personal protective equipment,

or likely to be aggravated by, or interfere with, established or required decontamination procedures.

(5) Hematopoietic Dysfunction

Clinically significant hematopoietic disorders which, in the judgment of the designated physician, may be expected to interfere with the safe and effective performance of assigned job duties.

(6) Malignant Neoplasms

Malignant neoplastic disease shall medically disqualify for security inspector duties unless review of history and current medical evaluation indicate a clinical cure or remission which, in the judgment of the designated physician, renders the examinee capable of safely and effectively performing all assigned job duties, and provided that the examinee is capable of satisfying all other requirements of this standard.

(7) Neurological

(a) History of epilepsy or other convulsive disorder.

(b) History of disturbance of consciousness without satisfactory medical explanation of the cause.

(c) Any other convulsive disorder, disturbance of consciousness, or neurological disease or condition that, in the judgment of the designated

physician, may be expected to interfere with the safe and effective performance of assigned job duties.

(8) Eyes

A one-eyed individual shall be medically disqualified for security inspector duties.

(9) Mental and Emotional

An established history or clinical diagnosis of any of the following:

(a) Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability shall constitute sufficient cause for medical disqualification. A history of clinically significant emotional or behavorial problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

(b) A personality disorder that is severe enough to have manifested itself by aberrant overt acts or expressed threat of such acts.

(c) History of attempted suicide. Expressed threat or history of expressed threat of suicide.

(d) A psychosis or established history of psychosis.

(e) Alcoholism. As used in this section, "alcoholism" means a condition in which a person's

intake of alcohol is great enough to significantly damage his physical health, job performance, personal functioning, or when alcohol has become a prerequisiste to his daily functioning.

(f) Drug abuse. As used in this section, "drug abuse" means a condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

(10) Use of Medication

The use of prescribed or otherwise legally obtainable medication taken in such a dosage that, in the judgment of the designated physician, the taking or temporary delay of taking might be expected to result in unacceptable incapacity shall be medically disqualifying. For example, certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, sedatives, tranquilizers, etc.

c. Determination of Medical Qualification

Despite an initial indication of medical disqualification, examinees may be considered for medical qualification when, in the judgment of the designated physician, a thorough history, supplemental physical examination, and other appropriate laboratory test and medical investigative procedures indicate that the examinee can safely and effectively perform all normal and emergency job duties; and provided that the designated physician determines that all such

duties are within the physical capability and exercise tolerance of the examinee. The designated physician shall notify the cognizant field office management authority of, and document the basis for, such determinations at the time when they are made.

7. Security Inspector Physical Fitness Qualification

Subject to a determination and written certification by a designated physician that there are no medical contraindications to participation by the examinee disclosed by a medical examination conducted within the preceding 30 days, security inspectors and security inspector applicants shall demonstrate physical fitness for security inspector duties by performance of the following exercise program within a period of 30 minutes:

a. Climb a 30- foot ladder.
b. Run 100 yards in 20 seconds and maintain functional capabilities.
c. Scale a 7-foot wall.
d. Sustain arduous activity for 3 minutes (i.e., jogging, pushups, or combinations of equally strenuous activities).
e. Pick up and carry 60 pounds for 30 feet.
f. Drag 200 pounds for 10 feet.

8. Waiver of Security Inspector Medical or Physical Fitness Standards

For special cases involving incumbent security inspectors, waivers of certain parts of the medical and physical fitness standards of this part may be

granted for certain disqualifying medical or physical deficiencies by the cognizant field office management authority, provided that:

a. The DOE field organization authority, in consultation with the designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these standards (i.e., to assure that all individuals assigned to security inspector duties are capable of safely and effectively performing all of the normal and emergency duties required by the security inspector positions to which they are assigned).

b. The employee demonstrates, by medical examination and/or practical test, as necessary, the ability to effectively and safely perform all of the routine and emergency duties that management, with the intent of accommodating the employee's deficiency, has assigned to him or her within the medical or physical limitations determined necessary by the designated physician.

c. A statement of demonstrated ability is prepared by the employee's supervisor and signed by the responsible field authority and the designated physician. The statement of demonstrated ability must clearly (1) identify the employee, (2) state the nature and degree of the specific medical or physical defect, (3) record any medical or physical job limitations

determined to be necessary by the designated physician, (4) record the satisfactory medical evaluation, and/or performance of the practical test, and (5) state the date and type of medical or practical test administered.

d. Waivers shall be revised, revalidated, and reissued at intervals not to exceed 1 year.

9. Guard Medical Qualification Standards

a. General Qualifications

The examinee shall possess mental, sensorial, and motor skills consistent with his/her assigned duties, viz:

(1) Mental alertness and reliable judgment.

(2) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals as required by assigned job duties.

(3) Motor power, range of motion, neuromuscular coordination, and dexterity as required to safely and effectively perform all assigned job duties.

b. Specific Minimum Qualifications

(1) Head, Face, Neck, and Scalp

Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is a job requirement in normal or emergency operations.

(2) Nose

Ability to detect odor of products of combustion and of tracer or marker gases.

(3) Mouth and Throat

Capacity for clear speech as required for effective communication on the job.

(4) Ears

Hearing loss not to exceed 50 db average at 500, 1000, and 2000 Hz in one ear (by ISO 1964 or ANSI 1969 audiometry). A hearing aid is permitted.

(5) Eyes

Near and distant visual acuity, with or without correction of at least 20/40 in the better eye. One-eyed individuals may qualify.

10. Guard Medical Disqualification

a. Freedom from Incapacity

The examinee shall be free of the following conditions that are determined by the designated physician to be medically disqualifying for the safe and effective performance of assigned duties:

(1) Mental, emotional, or physical impairment.

(2) Medical, surgical, or other professional health treatment.

(3) Any other treatment, drugs, chemicals, diets, or agents.

(4) Any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

b. Conditions for Which Disqualification Shall Normally be Mandatory

A history of any disqualifying condition shall be considered disqualifying unless adequate supplemental investigations and findings demonstrate that no disqualifying condition exists. Such demonstration shall include at least the specific narrative entries by the designated physician and relevant aspects of medical history, physical examination, and laboratory findings. The need for additional investigative procedures or specialty evaluation shall be determined by the designated physician. The presence of any of the following conditions normally shall disqualify the examinee:

(1) Respiratory

Significant pulmonary pathology or decrease in pulmonary function which, in the judgment of the designated physician, could interfere with the safe and effective performance of assigned duties.

(2) Cardiovascular

(a) The following conditions shall be medically disqualifying for guard duties:

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrythmia

7. Arterial Aneurysm

8. Significant Peripheral Vascular Insufficiency

(b) In selected cardiovascular cases, in the judgment of the designated physician, examinees may be considered for medical qualification for guard duties if thorough history, physical examination, electrocardiogram, and other test procedures indicate satisfactory cardiac function and reserve sufficient to allow the examinee to safely and effectively perform all assigned job duties, both normal and emergency, provided that the designated physician determines that all such duties and job tasks are within the physical capability and exercise tolerance of the examinee.

(3) Endocrine/Nutritional/Metabolic

(a) Diabetes Mellitus

Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.

(b) Obesity

Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency duties.

(4) Hematopoietic Dysfunction

Clinically significant hematopoietic disorders which, in the judgment of the designated physician, may be expected to interfere with the safe and effective performance of assigned job duties.

(5) Malignant Neoplasms

Malignant neoplastic disease shall medically disqualify unless review of history and current medical evaluation indicate a clinical cure or remission which, in the judgment of the designated physician, renders the examinee capable of safely and effectively performing all assigned job duties, and provided that the examinee is capable of satisfying all other requirements of these standards.

(6) Neurological

(a) History of epilepsy or other convulsive disorder.

(b) History of disturbance of consciousness without satisfactory medical explanation of the cause.

(c) Any other convulsive disorder, disturbance of consciousness, or neurological disease or condition that, in the judgment of the designated physician, may be expected to interfere with the safe and effective performance of assigned job duties.

(7) Mental and Emotional

An established history or clinical diagnosis of any of the following:

(a) Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability shall constitute sufficient cause for medical disqualification. A history of clinically significant emotional or behavorial problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

(b) A personality disorder that is severe enough to have manifested itself by aberrant overt acts or expressed threat of such acts.

(c) History of attempted suicide. Expressed threat or history of expressed threat of suicide.

(d) A psychosis or established history of psychosis.

(e) Alcoholism. As used in this section, "alcoholism" means a condition in which a person's intake of alcohol is great enough to significantly damage his physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his daily functioning.

(f) Drug abuse. As used in this section, "drug abuse" means a condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

(8) Use of Medication

The use of prescribed or otherwise legally obtainable medication taken in such a dosage that, in the judgment of the designated physician, the taking or temporary delay of taking might be expected to result in unacceptable incapacity shall be medically disqualifying. For example, certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, sedatives, tranquilizers, etc.

c. Determination of Medical Qualification

Despite an initial indication of medical disqualification, examinees may be considered for medical qualification when in the judgment of the designated physician a thorough history, supplemental physical examination, and other appropriate laboratory test and medical investigative procedures indicate that the examinee can safely and effectively perform all normal and emergency duties, and

provided that the designated physician determines that all such duties are within the physical capability and exercise tolerance of the examinee. The designated physician shall notify the cognizant field office management authority of, and document the basis for, such determinations at the time when they are made.

11. Waiver of Guard Medical Standards

For special cases involving guards, waivers of certain parts of the medical standards of this part may be granted for certain disqualifying medical or physical deficiencies by the cognizant field office management authority provided that:

a. The DOE field organization authority, in consultation with the designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards (i.e., to assure that all individuals assigned to guard duties are capable of safely and effectively performing all of the normal and emergency duties required by the guard positions to which they are assigned).

b. The employee demonstrates, by medical examination and/or practical test, as necessary, the ability to effectively and safely perform all of the routine and emergency duties that management, with the intent of accommodating the employee's deficiency, has assigned to him or her within the medical or physical limitations determined necessary by the designated physician.

c. A statement of demonstrated ability is prepared by the employee's supervisor and signed by the responsible field authority and the designated physician. The statement of demonstrated ability must clearly (1) identify the employee, (2) state the nature and degree of the specific medical or physical defect, (3) record any medical or physical job limitations determined to be necessary by the designated physician, (4) record the satisfactory medical evaluation and/or performance of the practical test, and (5) state the date and type of medical or practical test administered.

d. Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed 2 years.

12. Uniform Application

a. With respect to Government-employed protective personnel, the medical qualifications set forth above, shall be applied uniformly to all such employees consistent with the provisions of DOE IMD 3300 "Merit Staffing" and DOE IMD 3752, "Discipline" (to be issued) for DOE employees, and with the personnel provisions of the GSA Administrative Manual for GSA employees.

b. With respect to contractor-employed protective personnel contractors shall administer and apply the medical qualifications set forth above, in accordance with their published personnel policies and practices, including the

provisions of existing collective bargaining agreements, and consistent with the policies set forth in DOEPR 9-50.1201-2 Where existing labor or collective bargaining agreements, etc. are in conflict with the provisions of this part, efforts shall be made to bring these into conformance as soon as possible.

B. SECURITY INSPECTOR FORCE

1. When Required. A security inspector force is required at facilities which:

   a. Are Class "A" facilities, except those which are utilized solely as administrative areas.

   b. Contain nuclear weapons, nuclear test devices, complete nuclear assemblies, or significant quantities of special nuclear material.

   c. Contain security areas where classified matter cannot be adequately safeguarded during working hours by employees or during non-working hours by alarm protection.

2. Duties. Security inspectors shall perform the following duties:

   a. Enforce regulations concerning trespass, exclusion of prohibited articles, personnel identification, protection of classified matter, and special nuclear material.

   b. Observe and patrol designated perimeters, areas, and structures.

c. Prevent persons or vehicles from gaining unauthorized access to security areas.

d. Check repositories, rooms, or buildings containing classified matter during nonworking hours to determine that they are locked or otherwise in order.

e. Perform escort duties.

f. Respond to protective alarm signals or other indications of suspicious activity.

g. Act as necessary in the event of situations affecting the security of the facility, including fires, industrial accidents, internal disorders, and attempts to commit espionage, sabotage, or other criminal acts.

h. Protect classified matter and Government property against unauthorized access, theft, or intentional damage.

i. Report to supervisors all incidents or unusual circumstances affecting the security of the area at the time of occurrence or as soon thereafter as possible.

3. Emergency Duties. Plans covering emergency duties and deployment of security inspectors and other protective personnel shall be established and maintained at Class "A" facilities to assure adequate protection in the event of attempted or actual sabotage, theft, disaster, labor disturbance, or other situations threatening the security of the facility.

4. Training.

a. Prior to initial assignment to duty, each security inspector shall successfully complete a course of basic qualification training consisting of a minimum of 80 hours of classroom and practical instruction. Qualification training courses shall include at least the following subjects.

(1) General orientation.

(2) Purposes and principles of the DOE system of security.

(3) Security as applied to the local installation.

(4) Organization and functions of DOE and DOE contractor security inspector forces.

(5) Legal authority of the individual security inspector.

(6) Specific duties, including sufficient "breaking-in" training.

(7) Security inspector orders - general and specific.

(8) Discipline - obedience to orders.

(9) Employee and public relations.

(10) Self-defense.

(11) Communications facilities and procedures.

(12) Elementary first aid and fire protection.

(13) Report writing.

(14) Riot control.

(15) Safety and general training sufficient to provide knowledge of and protection from unique hazards of materials and operations.

(16) Operation and use of all security inspector post special and technical equipment such as metal, explosive, and SNM detectors, personnel identification systems, and night vision devices.

(17) If assigned to protect nuclear weapons, nuclear test devices, or special nuclear materials, additional advanced and specialized training shall be provided as appropriate to assigned job functions.

b. Before a security inspector shall be considered adequately trained and assigned to fully independent duties, the security inspector shall either be given a written examination or appropriate appraisal to verify his/her readiness to carry out the responsibilities to be assigned. If written examinations are given, test papers shall be retained for examination during scheduled security surveys.

c. Security inspectors shall be provided a minimum of 24 hours refresher training annually. Subject material for refresher training should

emphasize a review of duties, responsibilities, and procedures in which instruction is most urgently needed as determined by job performances and supervisor recommendations.

d. Records shall be maintained of the nature of all training conducted and the names of the security inspectors so trained.

5. Firearms Qualification

a. A security inspector shall not be authorized to carry a firearm until the responsible field office manager is assured within the limitation of his/her normal administrative capabilities, that the individual who is to be armed is emotionally stable and has qualified in accordance with DOE firearms standards. These requirements shall be applied to employees as set forth in A.12., above.

b. All security inspectors shall qualify initially, and subsequently at least annually, using the type and barrel-length of handgun, semiautomatic rifle, and shotgun and with the types of ammunition with which they are armed while on duty, on the DOE approved courses of fire specified in annex A. Authority to carry a firearm shall not be granted until a security inspector has qualified under the standards established. A minimum qualification score must be attained annually on each of the six approved courses of fire, and the scores shall be recorded on Form DOE-614. Initial establishment of requalification anniversaries for individual security inspectors on the various weapon courses of

fire shall be at the discretion of field office managers. It is recommended that these be dispersed throughout a 12-month period so that a year will not elapse between weapon firing periods and individuals will benefit from weapons practice at more frequent intervals.

c. Authority to carry a firearm shall be revoked if a security inspector fails to qualify annually on the approved courses of fire.

d. A Firearms Qualification Record, Form DOE-614, shall be maintained for each security inspector who qualifies, or who attempts to qualify, under B.5.b., above. Each record shall be retained until the next scores are entered on a new record and placed in the security inspector's file. Current records shall be retained for one year after separation of a security inspector from security inspector duties. The security inspector force chief or his/her supervisor shall be designated in writing as the individual authorized to certify the validity of the scores. Failure to certify a score prior to issuance of firearms authorization to a security inspector or submission of a false certification by the individual so designated shall be grounds for severe disciplinary action.

6. Authority to Carry Firearms. Section 161.k. of the Atomic Energy Act of 1954, as amended, authorizes the appropriate arming of DOE or DOE contractor personnel while engaged in the protection of property of the United States located at facilities owned by or contracted to the United States. Each

security inspector receiving this authorization shall be issued a laminated card containing the security inspector's photograph, signature, and actual or facsimile signature of the issuing DOE or DOE contractor official (if a facsimile signature is used on the card, a signed memorandum constituting the authorization shall be kept on file), date of issuance, and the following statement:

> "This is to certify that (name of guard) whose photograph and signature appear hereon has been authorized by the Manager, _____ Office, United States Department of Energy, pursuant to Section 161.k. of the Atomic Energy Act of 1954, as amended to carry firearms in the performance of his official duties while engaged in the protection of property owned by the United States and located at (facility name and location)." *

7. Equipment

   a. Uniform. Security inspector personnel shall be distinctively uniformed while on duty and identified with their function by appropriate emblems or badges.

* When a security inspector is assigned to several locations and it is impractical to specify all such locations on the card, the card may state "facilities owned by or contracted to the United States" instead of stating the facility name and location. However, each location to which the security inspector is assigned shall be identified and kept on file.

b. Arms and Ammunition. All security inspectors while on duty shall be armed with a combination of handgun and ammunition which develops a minimum of 300 foot-pounds of energy at the muzzle. Such weapons shall be in serviceable condition, fully loaded, and ready to use at all times while on duty. Additional weapons, such as rifles and shotguns will be available for, and issued to, security inspector forces as necessary. There shall be at least one auxiliary weapon plus 25% spare weapons for each security inspector post where nuclear weapons, major weapon components, or significant quantities of SNM are involved.

c. Vehicular patrols shall be equipped with either rifles or shotguns depending upon the terrain and the nature of the patrol. Firearms shall not be left unsecured in unattended vehicles.

d. V-100 s or other armored response vehicles shall be equipped with machine guns and auxiliary weapons. Adequate ammunition for all weapons shall be present on the vehicles when they are in a response readiness mode.

e. Security inspectors shall carry at least 12 rounds of extra handgun ammunition and shall have available flashlights and other equipment essential to the performance of the duties.

8. Use of Firearms

a. General Policy. The DOE will support the use by security inspectors of reasonable force (that is, the use of the minimum force, as indicated by the circumstances at the time) necessary for the discharge of their duties of safeguarding persons, classified information, classified matter, or special nuclear material.

Any incident involving use of a firearm by security inspectors will be reported immediately to the Director, Safeguards and Security, Headquarters.

b. Specific Incidents. In this regard, DOE will support the use of firearms by a security inspector carrying out his/her official responsibilities in conjunction with incidents of actual or attempted (1) substantial bodily harm to any person, as would constitute a felony under either Federal or applicable state law, or to apprehend an individual who has committed such an act, (2) theft or compromise of classified information or material, (3) theft or destruction of special nuclear material, and (4) damage or destruction of a facility which would seriously impair the ability of the DOE to safeguard special nuclear material, classified information, or nuclear weapons. The use of firearms will not be authorized if, under a reasonable view of the incident as it appeared at the time, lesser means would suffice.

c. Prevention of Unauthorized Access to DOE Security or SNM Areas. If a single individual attempts to enter an DOE security or SNM area without authority, a security inspector should not use a firearm to prevent the intrusion unless (1) there is a reason to believe that the intruder has firearms, explosives, incendiaries, or other instruments which could cause substantial bodily harm, or destruction of special nuclear material, or (2) the intruder attempts to use violence to gain admittance, and may thus inflict substantial bodily harm, and lesser means will not suffice to prevent the intrusion.

If more than one person attempts to enter a security area and it can reasonably be inferred that they intend to cause substantial bodily harm or theft or compromise of classified information or theft or destruction of special nuclear material, the use of firearms by the security inspector to prevent the intrusion is authorized if lesser means will not suffice.

d. Prevention of Theft or Sabotage of Nuclear Weapon or Nuclear Explosive Device. The loss of a nuclear weapon or nuclear explosive device through theft or sabotage would have the most serious consequences on the safety of the U.S. public and could seriously disrupt our national operations. Security inspectors are expected to discharge their firearms with the intent of hitting and if necessary, killing the person or persons being fired upon if such

action is the minimum amount of force necessary to prevent the theft or destruction of nuclear weapons or other nuclear explosive devices.

e. Self-Defense or Defense of Another Person. If the security inspector has reason to believe that substantial bodily harm to himself or another person is imminent, the use of firearms for defense is authorized when lesser means will not suffice to prevent such harm.

f. Prevention of Escape. If a person attempts to escape after having compromised or stolen classified information, or after having stolen or destroyed special nuclear material, or attempts to escape after having caused substantial bodily harm to any person, the use of firearms to prevent escape is authorized. Such use also is authorized if the person attempting to escape uses or threatens to use firearms or other forms of violence which may inflict substantial bodily harm. In any case, the use of firearms is authorized only if lesser means cannot prevent the escape.

g. Use of Firearms for Unauthorized Purposes. If a security inspector intentionally discharges a firearm for unauthorized purposes, DOE will take, or will request that the security inspector's employer take, appropriate disciplinary action. Examples of unauthorized purposes are the killing of animals, except as necessary in the interest of mercy, and unauthorized target practice.

h. Carrying of Firearms. Security inspectors shall carry only the firearms specifically authorized and shall not display or relinquish them to any person other than a supervisor, relief guard, or weapons room clerk.

Strict accountability for every firearm will be maintained by security inspector force supervisors.

i. Storage and Maintenance of Firearms.

1) All firearms in storage shall be securely locked in a substantially constructed container which is either fastened to the floor or wall or otherwise secured or is too heavy for easy removal. Access to keys or combinations shall be limited to supervisors and personnel authorized by supervisors to remove firearms.

2) An up-to-date inventory, listing the type of weapon, the manufacturer, and its serial number shall be conducted annually. Ammunition also shall be inventoried annually. The chief of the security inspector force or his/her supervisor shall attest as to the validity of the results.

All firearms shall be carefully inspected at least twice a year to determine serviceability, and a record of firearms maintenance checks shall be maintained. A minimum trigger pull of 2 1/2 pounds for all firearms shall be required.

j. Firearms for Emergency Use. Firearms that are maintained on post for use during emergencies shall be under the direct control of the security inspector on duty. Such firearms shall be in a position that they will be readily accessible to the guard on duty but inaccessible to the persons passing through the guard post.

9. Use of Aerosol Irritants or Other Tear Gas

a. Security inspectors will be instructed in the use of aerosol irritants or other tear gas which may be provided them.

b. Security inspectors are authorized to use aerosol irritants or other tear gas when its use is the exercise of reasonable force (that is, the minimum force, as indicated by the circumstances at the time) necessary for the discharge of their duties of safeguarding persons, classified information, classified or special nuclear material, or Government property.

c. In the event of use of aerosol irritants or other tear gas, care should be exercised, wherever possible, (1) to avoid direct or close application to the eyes of any person, and (2) to assure the availability of prompt medical attention to any persons affected. Any use of aerosol irritants or other tear gas must be immediately reported to the Director, Safeguards and Security, Headquarters.

10. Access Authorization

a. A DOE "Q" access authorization shall be required for security inspectors assigned for the protection of nuclear explosives or significant quantities of SNM or control of access to security areas containing such materials. A DOE "Q" access authorization shall be required for security inspectors assigned for protection to Top Secret or Secret Restricted Data, or cryptographic matter of any classification, or control of access to security areas containing such matter. If there is no access to any Restricted Data in the normal course of duty, a DOE Top Secret access authorization is acceptable in lieu of a "Q".

b. A DOE "L" access authorization shall, as a minimum, be required for security inspectors assigned for protection of matter classified Secret, National Security Information or Confidential Restricted Data, or for control of access to security areas containing such matter. If there is no access to any Restricted Data in the normal course of duty, a DOE secret access authorization is acceptable in lieu of an "L".

c. A Secret clearance granted by the Department of Defense may be used in lieu of a DOE access authorization for protective personnel assigned for the protection of matter classified Secret or Confidential National Security Information, or for control of access to security areas containing such matter.

11. Orders. General and special orders shall be issued in writing covering each post, patrol, or other assignment. They shall be clear, concise, and reviewed at any time that the duties are changed, or at least semiannually to assure that they are current. Dates of such review shall be recorded on the order and initiated by the supervisor making the review.

12. Supervision. Supervision of a security inspector force shall be provided to the extent required to assume proper and adequate performance of security inspector duties.

    a. Personal Supervision. At facilities where security inspector forces of more than 3 security inspectors for each shift are engaged, there shall be fulltime personal supervision. For shifts employing more than three security inspectors, there shall be a minimum of one supervisor for every 12 security inspectors.

       1) Each security inspector shall be inspected by his/her supervisor upon reporting for duty to determine his/her apparent physical fitness and the condition and adequacy of his sidearm, uniform, or other equipment. At such time, he/she shall be given necessary special instructions or orders.

       2) Each security inspector post, patrol, and other activity shall be personally inspected by supervisory personnel at least twice each shift to determine that personnel and the system in general are functioning properly.

b. Supervision by Other Means. Various means and devices, such as recorded and supervisory tour systems, may be utilized as supplements to personal supervision or, in the case of small facilities or remote areas, to supplant personal supervision as a means of assuring that the necessary areas are patrolled and that other functions are performed.

c. Reports. All security inspector personnel shall report regularly to their headquarters by established means of communication. Records of tours and reports to headquarters shall be checked carefully by security inspector supervisors. Failure of a security inspector to record a visit at a designated station, to report to headquarters as required, or other deviation from established report procedures, shall be investigated immediately.

d. Duty Log. A continuous record of all significant or unusual security inspector force activity, including details of any matters or occurrences having a bearing on the security of the facility, shall be maintained for each shift or day.

C. GUARDS

1. Basic Considerations. Guards may be utilized at DOE and contractor administrative buildings and other locations where there are no nuclear weapons, nuclear weapon components, significant quantities of SNM, Top Secret

documents, cryptographic material, or material having similar sensitivity. When utilized, guards shall be carefully instructed in their duties and responsibilities with respect to the protection of classified matter.

2. Duties. Guards shall observe and physically check locked repositories containing classified matter, respond to protective alarm signals, and report any untoward incident involving DOE classified matter or government property to a supervisor immediately.

3. Access Authorization. DOE access authorization for guards shall be the same as prescribed for security inspectors in B.10., above.

4. Qualification. Guards used for the protection of classified matter shall be subject to medical examination on initial assignment and at least biennially thereafter to assure their fitness to perform their duties under normal or emergency conditions. Training as specified in B.4. and B.9., above, applicable to the functions performed shall be given to guards and an appraisal reached as to the readiness to carry out the responsibilities assigned.

D. COMMUNICATIONS FOR PROTECTIVE PERSONNEL

1. Class "A" Facilities. (As modified in B.1.a.) Security inspectors at fixed posts shall have

both normal telephone service and two-way radio communication with central stations as well as points from which backup forces will be dispatched. Administrative controls shall be established to assure proper use of this system in an emergency. Duress alarms shall be provided at the security inspectors posts.

2. Class "B" Facilities. Class "B" facilities employing protective personnel to protect DOE classified matter shall be provided with a system which will afford both intraplant and outside communication.

3. Tests. Daily tests of protective communications systems are required.

E. SECURITY INSPECTOR POST STANDARDS

Permanent security inspector posts constructed after the date of this issuance controlling access to areas containing weapons, nuclear test devices, or complete nuclear assemblies, or special nuclear materials of the types and in amounts falling within the scope of IMD 6103 shall meet the following minimum standards:

1. Where geography and building arrangement permit, the security inspector station should be situated to provide an unobstructed view of the surrounding terrain.

2. Exterior walls (excluding windows) and doors shall be constructed of ore reinforced with materials which have a bullet penetration resistance equivalent to U.L. Class II.

3. Windows shall consist of 3/8" polycarbonate plastic behind 3/8" thick laminated safety glass or equivalent material or materials having bullet resistance equivalent to U.L. Class I.

4. Lights shall provide a minimum of two foot candles luminescence at ground level for at least a 30-foot diameter circle around the security inspector post and 0.2 foot candles for 150 feet in both directions on the roadway. Sodium vapor lamps are preferred.

5. If the security inspector post controls pedestrian traffic, a well-marked covered pedestrian lane shall be provided in front of the security inspector station.

6. Where a security inspector station controls vehicular access to a security area, the gates shall be constructed to permit closing from inside the security inspector station.

7. Security inspector posts should be equipped with communications systems in accordance with the requirements of D.1. or D.2., above.

IMD NO. 6102 January 31, 1978

ANNEX A

APPROVED COURSES

FIREARMS QUALIFICATION

1. Handgun - Day Qualification

DOE Day Handgun Course

(National Police Combat Course)

	Range	No. of Rounds	Time	Target
Stage 1	7 yds.	12	25 seconds	B-27
Stage 2	25 yds.	18	90 seconds	B-27
Stage 3	50 yds.	24	2 minutes, 45 seconds	B-27
Stage 4	25 yds.	6	12 seconds	B-27

Total 60 rounds

Score: Maximum possible - 300 Minimum qualifying - 200

FIRING STAGES

Stage 1 - 7 yards - double action - twelve rounds from the crouch position. Twenty-five seconds, time starts

with loaded gun in holster and includes reloading for second six round string.

Stage 2 - 25 yards - double action - six rounds kneeling, six rounds standing left hand from behind barricade, six rounds standing right hand from behind barricade. Ninety seconds, time starts with loaded gun in holster and includes reloading for subsequent six round strings.

Stage 3 - 50 yards - single or double action - six rounds sitting, six rounds prone, six rounds standing left hand from behind barricade, and six rounds standing right hand from behind barricade. Two minutes and forty-five seconds, time starts with loaded gun in holster and includes reloading for subsequent six round strings.

Stage 4 - 25 yards - double action - six rounds standing without support. Twelve seconds, time starts with loaded gun in holster. No barricade or other support is used.

The NRA Police Combat Rule booklet gives full details on the positions for firing each stage of the National Police Combat Course.

2. Handgun - Night Qualification

DOE Night Handgun Course

	Range	No. of Rounds	Time	Target
Stage 1	7 yds.	12	35 seconds	B-27
Stage 2	15 yds.	12	45 seconds	B-27

Total 24 rounds

Score: Maximum possible - 120 Minimum qualifying - 60

Firing Stages 1 and 2 - double action; standing or crouch position without artificial support; one or both hands; natural lighting augmented only by normal incidental firing range courtesy lighting. Time starts with loaded gun in holster and includes reloading for second six-round string.

3. Semiautomatic Rifle - Day Qualification

DOE Day Rifle Course

	Range	No. of Rounds	Position	Time	Target
Stage 1	100 yds.	5	Standing	30 seconds	B-27
Stage 2	100 yds.	5	Kneeling	30 seconds	B-27
Stage 3	100 yds.	5	Sitting	30 seconds	B-27
Stage 4	100 yds.	5	Prone	30 seconds	B-27

Total 20 rounds

Score: Maximum possible - 100 Minimum qualifying - 70

Firing Stages 1-4 - Semiautomatic mode of fire; no artificial support; iron sights; time begins with shooter in firing position, magazine with 5 rounds loaded in weapon, first round unchambered. (This course is applicable to all semiauto/auto rifles including M-1, M-14, M-16, M-1 and M-2 carbine, and Thompson submachine gun).

4. Semiautomatic Rifle - Night Qualification

DOE Night Rifle Course

	Range	No. of Rounds	Position	Time	Target
Stage 1	25 yds.	5	Standing	45 seconds	B-27
Stage 2	25 yds.	5	Kneeling	45 seconds	B-27
Stage 3	25 yds.	5	Sitting	45 seconds	B-27
Stage 4	25 yds.	5	Prone	45 seconds	B-27
		Total 20 rounds			

Score: Maximum possible - 100 Minimum Qualifying -50

Stages 1-4 - Semiautomatic mode of fire; no artificial support; iron sights; natural lighting augmented only by normal, incidental firing range courtesy lighting; time begins with shooter in firing position, magazine with 5 rounds loaded in weapon, first round unchambered. (Applicability same as DOE Day Rifle Course).

5. Shotgun - Day Qualification

DOE Day Shotgun Course

	Range	No. of Rounds	Position	Time	Target
Stage 1	15 yds.	5	Hip fire	15 seconds	B-27
Stage 2	25 yds.	5	Shoulder	15 seconds	B-27
		Total 10 rounds			

Score: Maximum possible - All available pellets within black silhouette (Dependent upon shell load fired).

Minimum qualifying - One-half of all available pellets within black silhouette.

Stages 1 and 2 - Semiautomatic or manual mode of fire; no artificial support; time begins with shooter in firing position, magazine loaded with 5 rounds, first round

unchambered; "00" buckshot load (consistent with local standard practice, magnum, or standard round loads may be used).

6. Shotgun - Night Qualification

DOE Night Shotgun Course

	Range	No. of Rounds	Position	Time	Target
Stage 1	15 yds	5	Hip fire	15 seconds	B-27
Stage 2	25 yds	5	Shoulder	15 seconds	B-27
		Total 10 rounds			

Score: Maximum possible - All available pellets within black silhouette (Dependent upon shell load fired).

Minimum qualifying - One-half of all available pellets within black silhouette.

Stages 1 and 2 - Semiautomatic or manual mode of fire; no artificial support; time begins with shooter in firing position, magazine loaded with 5 rounds, first round unchambered; natural lighting augmented only by normal, incidental firing range courtesy lighting; "00" buckshot load (consistent with local standard practice, magnum or standard round loads may be used).

Note: Scoring of the B-27 target for handgun and semiautomatic rifle qualification shall be in accordance with the "Training and Qualification Scoring" specified on the target (i.e., hits in the 10, 9, and 8 rings score 5 points; hits in the 7 ring score 4 points; all other hits within the black silhouette score 3 points).

ATTACHMENT B2

U.S. DEPARTMENT OF ENERGY

Washington, D.C.

NOTICE
DOE N 5632.1

8-13-79
EXPIRES: 8-12-80

SUBJECT: PHYSICAL PROTECTION OF CLASSIFIED MATTER AND INFORMATION

1. PURPOSE. This notice revises standards and procedures contained in IMD 6102 Appendix Part IV for determining the physical fitness condition of, and the identity of individuals eligible to be granted waivers of certain parts of the medical and physical fitness standards for, security inspectors employed or to be employed, under direct or indirect contract to the Department of Energy (DOE).

2. SCOPE. The provisions of this notice apply to all elements of DOE, including the Federal Energy Regulatory Commission (FERC) and to DOE con-

tractors and subcontractors who employ security inspectors under DOE contracts.

3. REFERENCE. IMD 6102, Serial No. 56, Appendix IV, Physical Protection of Classified Matter and Information (Protective Personnel), of 1-31-78, as extended by DOE N 1321.45, of 6-26-79.

4. INSTRUCTIONS.

a. Delete the present paragraph A.7. on page 13 of IMD 6102, Appendix IV and replace with the following:

"7. Security Inspector Physical Fitness Qualification.

a. It is essential to the acceptable performance of security inspector duties that individuals possess a level of physical fitness training and conditioning which is adequate to provide reasonable assurance of their continuing capabilities to safely and effectively perform the physically strenuous emergency duties which are reasonably and realistically anticipated to be demanded of the security inspector position to which they are assigned. Subject to a determination and written certification by a designated physician that there are no medical contraindications to participation disclosed by medical examination conducted within the preceding 30 days, prior to initial assignment to security inspector duties and annually thereafter, the physical fitness condition of security inspectors

and applicants shall be evaluated. Performance within a period of 30 minutes of a physical exercise program, approximating in physical performance demands those of the following generic program, is acceptable for demonstration by an individual of satisfactory completion of physical fitness maintenance training and conditioning adequate to provide reasonable assurance of a continuing capability to respond to the demands of assigned security inspector emergency response duties:

(1) Climb a 30-foot ladder.

(2) Run 100 yards in 20 seconds and maintain functional capabilities.

(3) Scale a 7-foot vertical barrier.

(4) Sustain arduous activity for 3 minutes (i.e., jogging in place, pushups, pullups, or other combinations of comparably strenuous activities)

(5) Pick up and carry 60 pounds for 30 feet.

(6) Drag 175 pounds for 10 feet.

b. At those facilities where any of the elements of the generic exercise program cannot be validated as job-related during reasonably postulated emergency situations, heads of field offices shall substitute alternate elements of similarly strenuous physical demands which can be validated as job-related and justified by business necessity in accordance with the Uniform Guidelines on Employee Selection Procedures (1978), 43 F.R. 38290 (8-25-78).

c. On a case-by-case basis as the need may be indicated, individuals should be provided encouragement, guidance and a reasonable amount of assistance and support in undertaking a program of physical fitness training which will enable them to achieve a satisfactory level of physical fitness conditioning. Initial and subsequent annual satisfactory evaluation of an individual's physical fitness is required for assignment to security inspector duties. In the event an individual is unable to perform certain specific elements of a validated site-specific physical exercise program because of physical disability or an inability to attain a sufficiently high level of physical fitness conditioning, the overall physical fitness condition of the individual should be evaluated in the context of, and consistent with, the objective of providing reasonable assurance of safe and effective performance of strenuous site-specific emergency response duties. In special cases involving individuals who possess high levels of professional qualifications and/or

experience, the cognizant field office management authority may consider the waiving of individual elements of the physical exercise program provided that the requirements, procedures, and guidelines of Section A.8. of this part are followed."

b. In the first line of the text of Section A.8. on page 13 of IMD 6102 Appendix IV delete the words "incumbent security inspectors" and replace with the words "individuals who possess high levels of professional qualifications and/or experience".

c. In the first and fourth lines of paragraph A.8.b. and the first and fourth lines of paragraph A.8.c. change the words "employee" and "employee's" to read "individual" and "individual's", respectively.

d. Add new paragraph A.8.e. on page 14 as follows:

"e. Individual security inspector employees covered by this Directive who have been adversely affected by application of the standards may appeal the denial of a request for waiver by the contractor or subcontractor, and the denial of a waiver, to the cognizant DOE field office for review. Further evidence may be offered going solely to the medical or physical fitness of the individual involved. An employee may select a representative of his or her own choice to assist and/or appear in the employee's behalf in any appeal. After findings and a determination at that level, such employee may petition as a matter of right to the Director of Safeguards and Security of the Department for review and determination on

the record. At the discretion of the Director, an employee or his representative may present oral argument to the Director."

e. Add new paragraph A.11.e. on page 19 as follows:

"e. Individual guard employees covered by this Directive who have been adversely affected by application of the standards may appeal the denial of a request for waiver by the contractor or subcontractor, and the denial of a waiver, to the cognizant DOE field office for review. Further evidence may be offered going solely to the medical or physical fitness of the individual involved. An employee may select a representative of his or her own choice to assist and/or appear in the employee's behalf in any appeal. After findings and a determination at that level, such employee may petition as a matter of right to the Director of Safeguards and Security of the Department for review and determination on the record. At the discretion of the Director, an employee or his representative may present oral argument to the Director."

f. The substances of the foregoing revisions are being incorporated in DOE Order 5632 "Protective Personnel" which is being coordinated to supersede IMD 6102 Appendix IV.

FOR THE SECRETARY OF ENERGY:

William S. Heffelfinger
Director of Administration

PART 1046—PHYSICAL PROTECTION OF SECURITY INTERESTS

Subpart A—General

Sec.
1046.1 Purpose.
1046.2 Scope
1046.3 Definitions.

Subpart B- Protective Force Personnel

1046.11 Medical and Physical Fitness Qualification Standards.
1046.12 Physical Fitness Training Program.
1046.13 Medical certification.

APPENDIX A TO SUBPART B. PART 1046—MEDICAL AND PHYSICAL FITNESS QUALIFICATION STANDARDS.

AUTHORITY: Sec. 2201, Pub. L. 83-703, 68 Stat. 919 (42 U.S.C. 2011 et seq.); sec. 7151, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.)

SOURCE: 49 FR 46101, Nov. 23, 1984, unless otherwise noted.

Subpart A—General

§1046.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter "DOE," security policies and procedures regarding the physical protection of security interests.

§1046.2 Scope.

This part applies to DOE contractor employees at Government-owned facilities, whether or not privately operated.

§1046.3 Definitions.

For the purposes of this part:

Contractor. The term "contractor" includes subcontractors at all terms.

Defensive Combative Personnel. Security inspectors other than offensive combative personnel.

Designated Physician. An occupational medical physician who is recommended by the designated management supervisory official of the local DOE field office and authorized by the Medical Director, Office of Operational and Environmental Safety, Headquarters, to determine the medical and physical condition of protective force personnel. When an occupational medical physician is not available, physicians who are not board-certified in occupational medicine may be recommended and authorized by the Medical Director as designated physicians for the purpose of this part. Designated physicians need not be employed full-time, but contractually shall be responsible to DOE for performance of the medical functions required by this part.

Facility. An educational institution, manufacturing plant, laboratory, office building or other area utilized by the DOE or its contractors or subcontractors for the performance of work under DOE jurisdiction.

Field Organization. Any organizational component of the DOE located outside the Washington, D.C. metropolitan area.

Guard. An unarmed individual who is employed for, and charged with, the protection of classified matter or Government property.

Medical Condition. General health, physical condition, and emotional and mental stability.

Offensive Combative Personnel. Security inspectors assigned to response force duties including pursuit and assault functions.

Protective Force Personnel. Guards and security inspectors assigned to protective details, who are employed to protect DOE security interests.

Security Inspector. A uniformed person who is authorized under section 161.k of the Atomic Energy Act of 1954, as amended, or other statutory authority, to carry firearms and to make arrests without warrants and who is employed for, and charged with, the protection of classified matter, special nuclear material, or other Government property.

Subpart B—Protective Force Personnel

§1046.11 Medical and Physical Fitness Qualification Standards.

(a) Except as provided in subparagraph (b) DOE contractors shall not employ as protective force personnel any individual who fails to meet the applicable medical and physical fitness qualification standards as set forth in Appendix A, to this subpart, "Medical and Physical Fitness Qualification Standards."

(b)(1) Incumbent security inspectors have until (insert date 12 months from effective date of regulation) to meet the applicable physical fitness qualification standards.

(2) Current waivers to the medical qualification standards remain in effect and future waivers are permitted.

(c) Each security inspector shall meet the applicable medical and physical fitness qualification standards every twelve months after the initial qualification. Each guard shall meet the applicable medical standards every two (2) years after the initial qualification.

§1046.12 Physical Fitness Training Program.

(a) Beginning January 24, 1985, each incumbent security inspector, who has not met the applicable physical fitness qualification standard, shall participate in a DOE approved physical fitness training program. Once an incumbent security inspector has begun a physical fitness training program, it must be completed before the security inspector may take the applicable physical fitness qualification standards test. Once a physical fitness training program is completed, an

incumbent security inspector has thirty (30) days to meet the applicable physical fitness qualification standards.

(b) An incumbent security inspector who fails to qualify within thirty (30) days of completing a physical fitness training program shall participate in an additional training program. Upon completion of the additional physical fitness training program the security inspector has thirty (30) days to meet the applicable physical fitness qualification standard. No additonal training or time extension to meet the standards is permitted except for unusual circumstances as set forth in the Appendix, Paragraph G(2).

(c) A security inspector who fails to requalify within thirty (30) days after his or her yearly anniversary date of the initial qualification shall participate in a physical fitness training program. Security inspectors have a maximum of six (6) months from the anniversary date to requalify.

(d) After his or her initial qualification, each incumbent security inspector shall participate in a DOE-approved physical fitness training program on a continuing basis. This training is for the purpose of ensuring that security inspectors maintain the requisite physical fitness for effective job performance and to enable the individual security inspector to pass the applicable annual physical fitness requalification test without suffering any undue physical injury.

[49 FR 46101. Nov. 23, 1984, as amended at 51 FR 7248, Mar. 3, 1986]

§1046.13 Medical certification.

Each individual shall have a medical examination within thirty (30) days preceding participation in a physical fitness training program and the physical fitness qualification standards test, and a determination and written certification by a designated physician that there are no foreseeable medical risks as disclosed by the medical examination to the individual's participation in a physical fitness training program and the physical fitness qualification standards test.

APPENDIX A TO SUBPART B OF PART 1046—MEDICAL AND PHYSICAL FITNESS QUALIFICATION STANDARDS

A. *Applicability.* This Appendix A to Subpart B of Part 1046 provides the minimum medical and physical fitness qualifications, criteria, and guides to be used by designated physicians and management supervisory officials in advising responsible DOE officials whether the medical and physical condition of protective force personnel to be employed by DOE contractors reasonably assures that they can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site and the general public.

B. *Application of Medical and Physical Fitness Qualification Standards.*

(1) The standards in this Appendix are the minimum necessary to determine the medical and physical capability of protective force personnel to perform all normal and emergency duties effectively and safely.

(2) Security inspector applicants shall meet the applicable physical fitness standards in this Appendix prior to assignment to security inspector duties.

(3) Incumbent security inspectors shall meet the applicable physical fitness standards in this Appendix within one year of the effective date of these standards and once every twelve months thereafter or shall be relieved of security inspector duties subject to the provisions in paragraph G below.

(4) Incumbent security inspectors shall meet the applicable medical standards prior to assignment to security inspector duties and annually thereafter, subject to the provisions of paragraph G below.

(5) Guards shall meet the applicable standards in this Appendix prior to assignment to guard duties and biennially thereafter, subject to the provisions of paragraph J below.

(6) The determination of whether or not the examinee meets the medical standards in this Appendix shall be made by a designated physician.

(7) The determination of whether or not the examinee meets the physical fitness standards in this Appendix shall be made by a designated management supervisory official in coordination with a designated physician.

(8) When a designated physician determines that special medical evaluations and practical performance tests are necessary in order for an examinee to demonstrate the examinee's abilities to perform all normal and emergency duties, a determination of the adequacy of performance shall be made by a designated physician.

(9) For those facilities where it is necessary to determine the medical qualification of security inspectors or security inspector applicants to perform special assignment security inspector duties which might require exposure to unusually high levels of stress or physical exertion, field office managers may develop more stringent medical qualification requirements or additional medical or physical tests as necessary for such determinations. All such additional qualification requirements shall be forwarded, with justification, for the approval of the Director of Safeguards and Security, Headquarters, prior to application and if approved, shall be

implemented in the same manner that these qualification standards have been implemented.

(10) The provisions of DOE 5480.1A, ENVIRONMENTAL PROTECTION, SAFETY, AND HEALTH PROTECTION PROGRAM FOR DOE OPERATIONS, of 8-13-81, Chapter VIII, Part 4 apply for return to work after recovery from a temporarily disqualifying medical or surgical condition.

C. *Administrative Procedures and Requirements.*

(1) *Medical Confidentiality and Retention of Medical Reports.*

(a) The medical information and data on each employee or applicant shall be maintained as confidential, privileged medical information and shall not be released by a designated physician without the written consent and release of the employee or applicant, except as permitted or required by law.

(b) When an individual has been examined by a designated physician, all available history and test results should be retained by the responsible DOE or DOE contractor medical department, in accordance with DOE 5480.1A, Chapter VIII, Part 4, whether or not the individual completes the examination, and whether or not potentially disqualifying defects are recorded.

(2) *Change of Health Status of Protective Force Personnel.*

(a) It is the specific responsibility of protective force employees to report immediately to their supervisor any known or suspected change in their health which might impair their capacity for duty or the safe and effective performance of assigned job duties.

(b) Supervisory personnel have the responsibility to make a timely report to a designated physician on any behavorial and health changes and deterioration in work performance that is observed in protective force personnel under their jurisdiction. Examples of areas that may indicate medical and emotional problems include: incidents of ineptness, poor judgment, lack of physical or emotional stamina, social incompatibility, excessive absence, lateness, and a tendency to become accident prone.

(3) *Use of Corrective Devices.*

(a) When the use of corrective devices, such as eyeglasses and hearing aids, is required tc enable an examinee to meet successfully medical qualification requirements, a determination shall be made by a designated line supervisory authority that the use of all such devices is compatible with all emergency and protective equipment that the examinee may be required to wear or use while performing his or her assigned job duties.

(b) It is incumbent upon cognizant field office management to exercise all reasonable and practicable effort to accommodate required emergency and protective equipment to the use of corrective devices, including the provision of equally effective alternate equipment if such is available.

(c) If eyeglasses are used, they shall be of the safety glass type.

D. *Security Inspector Medical Qualification Standards.*

(1) *General Qualifications.*

The examinee shall possess mental, sensorial, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include:

(a) Mental alertness and reliable judgment;

(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written. spoken, audible, visible, or other signals; and,

(c) Motor power, range of motion, neuromuscular coordination and dexterity.

(2) *Specific Minimum Qualifications.*

(a) *Head, Face, Neck, Scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) *Nose.* Ability to detect odor of products of combustion and of tracer and marker gases.

(c) *Mouth and Throat.* Capacity for clear and audible speech as required for effective communication on the job.

(d) *Ears.* Hearing loss in the better ear not to exceed 30 db average at 500, 1000, 2000 Hz with no level greater than 40 db in any of these frequencies (by ISO 1964 and ANSI 1969 audiometry). If a hearing aid is necessary, suitable testing procedures shall be used to assure auditory acuity equivalent to the above requirement.

(e) *Eyes. 1 Distant Visual Acuity.*

(a) Uncorrected acuity of no less than 20/200 in the better eye.

(b) Corrected acuity of at least 20/30 in the better eye and 20/40 in the other eye.

(c) If uncorrected distant vision in the better eye is not at least 20/40, security inspectors shall carry an extra pair of corrective lenses.

2 Near Visual Acuity. Corrected or uncorrected vision of at least 20/40 (14/28 Snellen) in the better eye.

3 Color Vision. Ability to distinguish red, green, and yellow. Special color vision testing and certification shall be required where fine color discrimination is critical to the safe or effective performance of assigned job tasks.

4 Peripheral Vision. Field of vision in the horizontal meridian shall not be less than a total of 140 degrees.

5 Depth Perception. Adequate depth perception as measured by stereopsis or demonstration in a practical operational test.

(f) *Cardiorespiratory.*

1 Respiratory. Capacity and reserve to perform physical exertion in emergencies at least equal to the demands of the job assignment, and ability to utilize respiratory protective filters and air supply masks when this emergency equipment is required by assigned job requirements.

8. Significant Peripheral Vascular Insufficiency
9. Corrective Heart Surgery
10. Corrective Arterial or Great Vessel Surgery
11. Prosthetic Valve
12. Artificial Pacemaker

(c) *Endocrine/Nutritional/Metabolic.*

1 Any endocrine, nutritional, or metabolic condition that would not allow the examinee adequately to meet the stresses and demands of assigned normal or emergency job duties.

2 Inability to accommodate to changing work schedules or to a delay in meals without potential or actual incapacity.

3 Inability to tolerate prolonged use of wearing of protective garments such as respirator masks, air masks, or bullet-resistant garments.

4 Diabetes mellitus requiring the use of insulin. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous 2 years.

5 Obesity of such degree that it would interfer with the safe and effective performance of normal and emergency job duties.

(d) *Skin.* Recurrent severe dermatitis or hypersensitivity to irritants or sensitizers sufficient to interfere with wearing required personal protective equipment or likely to be aggravated by or interfere with established or required decontamination procedures.

(e) *Hematopoietic Dysfunction.* Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(f) *Malignant Neoplasms.* Malignant neoplastic disease.

(g) *Neurological.*

1 History of epilepsy or other convulsive disorder.

2 History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(h) *Eyes.* Total blindness in one or both eyes.

(i) *Mental and Emotional.* An established history or clinical diagnosis of any of the following:

1 Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotiional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

2 Attempted suicide or an expressed threat of suicide.

3 A condition in which a person's intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

4 A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

5 The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. Examples of such medications are certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, sedatives, and tranquilizers.

F. *Physical Fitness Standards for Security Inspectors.*

(a) The DOE field organization authority in consultation with a designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all security inspectors are capable of safely and effectively performing all normal and emergency duties.

(b) The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routine and emergency duties.

(c) A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or performance of the practical test required by a designated physician.

(d)Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed one (1) year.

(e) Individuals who have been adversely affected by application of the standards may appeal the denial of waiver to the cognizant DOE safeguard and security field office for review within 60 days after the adverse action. Further evidence may be offered relating solely to the medical or physical fitness of the individual involved. Such individual may select a representative of his or her own choice to assist and/or appear in the individual's behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters, within 30 days of the field office's determination for a final determination based upon his or her review of the record of the case.

(2) There will be no waivers granted from the physical fitness standards set forth in Paragraph F above. However, time extensions not to exceed 6 months may be granted on a case-by-case basis for those individuals who, because of a temporary medical or physical condition as certified by a designated physician, are unable to satisfy the physical fitness standards within the required time period without suffering undue physical harm.

H. *Guard Medical Qualification Standards.*

(1) *General Qualifications.* The examinee shall possess mental, sensory, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include.

(a) Mental alertness and reliable judgment.

(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals.

(c)Motor power, range of motion, neuro-muscular coordination, and dexterity.

(2) *Specific Minimum Qualifications.*

(a) *Head, Face, Neck, and Scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) *Nose.* Ability to detect odor of products of combustion and of tracer or marker gases.

(c) *Mouth and Throat.* Capacity for clear and audible speech as required for effective communication on the job.

(d) *Ears.* Hearing loss not to exceed 50 db average at 500, 1000, and 2000 Hz in one ear (by ISO 1964 or ANSI 1969 audiometry).

(e) *Eyes.* Near and distant visual acuity, with or without correction of at least 20/40 in the better eye. One-eyed individuals may qualify.

2 *Cardiovascular.* Normal configuration and function. Capacity for exertion during emergencies. Normal resting pulse; regular pulse. Full symmetrical pulses in extremities and neck. Normotensive, with tolerance to rapid postural changes. If an examination reveals significant cardiac arrhythmia, murmur, enlargement, hypertension, hypotention, or other evidence of cardiovascular abnormality, an evaluation by a specialist in internal medicine or cardiology may be required and evaluated by a designated physician.

(g) *Abdomen and Viscera.* No clinically significant abnormalities.

(h) *Musculo-Skeletal.* Normal symmetrical structure, range of motion, and power.

(i) *Skin.* No significant abnormal intolerance to chemical, mechanical and other physical agents. Capability to tolerate use of personal protective covering and decontamination procedures when required by assigned job duties.

(j) *Endocrine/Nutritional/Metabolic.* Endocrine/nutritional/metabolic status adequate to meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing work and meal schedules without potential or actual incapacity.

(k) *Hematopoietic.* Normal function.

(l) *Lymphatic.* Normal.

(m) *Neurological.* Normal central and peripheral nervous system function.

(n) *Mental and Emotional.* Normal mental status and an absence of neurotic or psychotic conditions which would affect adversely an ability to handle firearms safely or to act safely and effectively under normal and emergency conditions.

(o) *Laboratory.*

1 Hemogram. Freedom from clinically significant abnormalities of the formed elements of the blood that could reasonably be expected to affect the safe and effective performance of assigned duties.

2 Urinalysis. Absence of proteinuria and glycosuria unless the absence of a disqualifying systemic or genitourinary condition and the absence of significant microscopic abnormality has been demonstrated.

3 Other Studies. Any other medical investigative procedure, including electrocardiogram and chest x-ray, which a designated physician considers necessary for adequate medical evaluation.

E. *Security Inspector Medical Disqualification Standards.*

(1) *Freedom from Incapacity.* The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

(2) *Conditions for Medical Disqualification.* The presence of any of the following conditions shall disqualify the examinee from employment as a security inspector.

(a) *Respiratory.* Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) *Cardiovascular*

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrhythmia

7. Arterial Aneurysm

All persons authorized to carry firearms must meet a minimum standard of physical fitness. There are two categories for such person: Offensive Combative and Defensive Combative. Persons not authorized to carry firearms are exempt from these physical fitness standards.

(1) *Offensive Combative Standard* must be met by all security inspectors assigned to response force duties. The standard is a one (1) mile run with a maximum qualifying time of 8 minutes 30 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.0 seconds.

(2) *Defensive Combative Standard* must be met by all security inspectors authorized to carry firearms. The standard is a one-half (0.5) mile run with a maximum qualifying time of 4 minutes 40 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.5 seconds.

(3) *Qualification* in the appropriate combative standard must be accomplished once every twelve months and under the supervision of the protective force training officer or other individual designated by the responsible DOE field office.

(4) *Medical Certification.* (a) Each individual who participates in a physical fitness training program to prepare to meet the physical fitness standards set forth in this Appendix shall first be certified by a designated physician that he or she is medically fit to participate in the program. This certification shall be obtained not more than 30 days prior to each individual entering the physical fitness training program.

(b) Before any individual takes the physical fitness standards test he or she shall first be certified by a designated physician that he or she is medically fit to

take the physical fitness qualification test. This certification shall be obtained not more than 30 days before taking the physical fitness qualification test.

(c) Individuals who require less than 30 days training prior to actual testing to meet the physical fitness standards need only obtain a single medical certification.

(5) *Initial Qualification Time Limit.* Individuals authorized to carry firearms shall meet the applicable physical fitness standard by (insert date 12 months from date this rule is effective) and annually thereafter using the date of initial qualification as the anniversary date.

(6) *New Employees.* Individuals authorized to carry firearms who are employed after the effective date of this rule shall meet the applicable physical fitness standard prior to his or her initial assignment to duties which requires such individual to carry firearms.

(7) *Training Program.* Beginning January 23, 1985, incumbent security inspectors shall participate in a physical fitness training program.

(8) *Retesting.* During each testing period a security inspector shall be permitted a maximum of six (6) and a minimum of two (2) opportunities to qualify or requalify before such security inspector must enter a training program or is removed from a security inspector position.

G. *Waiver of Security Inspector Medical Standards and Time Extension to Meet Physical Fitness Standards.*

(1) Waivers of elements of the medical standards of this Appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

I. *Guard Medical Disqualification Standards.*

(1) *Freedom from Incapacity.* The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

(2) *Conditions for Medical Disqualification.* The presence of any of the following conditions normally shall disqualify the examinee from employment as a guard:

(a) *Respiratory.* Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) *Cardiovascular.*

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrhythmia

7. Arterial Aneurysm

8. Significant Peripheral Vascular Insufficiency

(c) *Endocrine/Nutritional/Metabolic*

1. Diabetes Mellitus. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.

2. Obesity. Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency job duties.

(d) *Hematopoietic Dysfunction.* Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(e) *Malignant Neoplasms.* Malignant neoplastic disease.

(f) *Neurological.*

1. History of epilepsy or other convulsive disorder.

2. History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(g) *Mental and Emotional.* An established history or clinical diagnosis of any of the following:

1. Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

2. Attempted suicide or an expressed threat of suicide.

3. A condition in which a person's intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

4. A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

5. The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. For example, certain dosages or requirements for steroids, anticoagulants, antiarryhythmics, sedatives, tranquilizers, etc.

J. *Waiver of Guard Medical Standards.*

Waivers of elements of the medical standards of this Appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

(1) The DOE field organization authority, in consultation with a designated physician, determines that a

certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all guards are capable of safely and effectively performing all normal and emergency duties.

(2) The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routine and emergency duties.

(3) A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or of performance of the practical test required by a designated physician.

(4) Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed two (2) years.

(5) Individuals who have been adversely affected by application of these medical standards may appeal the denial of waiver to the cognizant DOE safeguard and security field office for review within 60 days after the adverse action. Further evidence may be offered relating solely to the medical or physical fitness of the individual involved. Such individual may select a representative of his or her own choice to assist and appear in the individual's behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters within 30 days of the field office's determination, for a final determination based upon his or her review of the record of the case.

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